

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 22

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Administrative Rules Bureau at (406) 444-2055.

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the adoption )	AMENDED
of NEW RULE I; and the )	NOTICE OF PROPOSED
amendment of ARM 17.8.321 )	ADOPTION AND AMENDMENT
pertaining to minimum federal )	
requirements for the use of )	
credible evidence to establish )	
noncompliance in an )	(AIR QUALITY)
enforcement action )	

TO: All Concerned Persons

1. On February 10, 2000 the Board published a Notice of Public Hearing on Proposed Adoption and Amendment at page 250 of the 2000 Montana Administrative Register, Issue No. 3, to consider two alternatives addressing minimum federal requirements for the use of credible evidence to establish noncompliance in an enforcement action. One alternative was prepared by the Department of Environmental Quality, and the other was prepared by a working group composed of various owners and operators of affected facilities which would be subject to the rule.

2. On May 25, 2000, the Board published a Supplemental Notice of Public Hearing on Proposed Adoption and Amendment, which proposed five new alternatives for consideration. The Supplemental Notice was published at page 1289 of the 2000 Montana Administrative Register, Issue No. 10.

3. The purpose of this amended proposal notice is to correct the citation of authority for the new rule alternatives listed in the two previous notices. For each of the seven proposed alternative new rules, the citation of authority listed the following three sections of the Montana Code Annotated: 75-2-111, 75-2-203 and 75-2-217.

4. In addition to the three sections of the Montana Code Annotated identified above, each of the citations of authority for the seven proposed alternative new rules should include the following section of the Montana Code Annotated: 75-2-201.

BOARD OF ENVIRONMENTAL REVIEW

by: Joe Gerbase  
JOE GERBASE, Chairperson

Reviewed by:

David Rusoff  
David Rusoff, Rule Reviewer

Certified to the Secretary of State November 13, 2000.

BEFORE THE DEPARTMENT OF CORRECTIONS  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC  
ARM 20.9.701, and adoption of ) HEARING ON PROPOSED  
new rule I pertaining to the ) AMENDMENT AND ADOPTION  
parole and discharge of youth )

TO: All Concerned Persons

1. On December 13, 2000 at 10:00 a.m., a public hearing will be held in the first floor conference room of the Department of Corrections, 1539 11th Ave., at Helena, Montana, to consider the proposed amendment and adoption of the above stated rules.

2. The Department of Corrections will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternate accessible format of this notice. If you require an accommodation, contact the Department of Corrections no later than 3:00 p.m. on December 8, 2000, to advise us of the nature of the accommodation that you need. Please contact Cj Johnson, Department of Corrections, 1539 11th Ave., Helena, Montana 59620; telephone 406-444-7917; fax 406-444-1976; e-mail address cjjohnson@state.mt.us.

3. The changes in these rules are necessary because the statutes governing the release of youth from juvenile correctional institutions have changed since the adoption of the existing rules. These changes will bring the Administrative Rules of Montana into compliance with statute.

4. The rule as proposed to be amended provides as follows, stricken matter interlined, new matter underlined.

20.9.701 PAROLE OF YOUTH FROM A STATE YOUTH CORRECTIONAL FACILITY For the purpose of this sub-chapter the following definitions apply:

(1) remains the same.

(2) "Discharge" means formal action taken by the department to relieve the state of jurisdiction over a youthful offender who has been committed to department custody.

(2) through (5) remain the same, but are renumbered (3) through (6).

~~(6)(7)~~ "Parole" means the conditional release of a youthful offender from a state youth correctional facility to the a parole supervision of the department program.

(7) through (10) remain the same, but are renumbered (8) through (11).

AUTH: 52-5-102, ~~52-5-105,~~ and ~~52-5-126,~~ MCA  
IMP: 52-5-102, MCA

5. The proposed new rule provides as follows:

RULE I DISCHARGE OF YOUTHFUL OFFENDER (1) If a youthful offender is on parole status it is the responsibility of the juvenile parole officer to submit a "request for discharge" to the community corrections administrator or designee when:

- (a) the youth has attained age 18;
- (b) the court order committing the youth to the department has expired;
- (c) the youth is being prosecuted in criminal court as an adult; or
- (d) the youth is appropriate for discharge because the youth has met all the conditions of his/her parole agreement and has responded positively to programming.

(2) If a youthful offender is residing in a state youth correctional facility it is the responsibility of the facility caseworker to submit a "request for discharge" to the facility superintendent or designee when:

- (a) the youth as attained age 18;
- (b) the court order committing the youth to the department has expired;
- (c) the youth is being prosecuted in criminal court as an adult; or
- (d) the youth has served the maximum period of confinement pursuant to 41-5-1522, MCA.

(3) The community corrections administrator or facility superintendent will review the request for discharge and forward the request to the department director for approval or disapproval.

(4) The department director may approve or deny the request for discharge. If the director approves the request, the director will sign the request, and distribute copies of the signed request for discharge to:

- (a) the administrator or designee of the community corrections division, or the superintendent of the appropriate state youth correctional facility;
- (b) the youth court probation office; and
- (c) the youth's juvenile parole officer.

(5) The victim notification requirements of 41-5-1416, MCA, must be fulfilled if the victim has provided the department with a current address and telephone number.

(6) If the director denies the request for discharge, the director will return it to the community corrections administrator or appropriate superintendent stating the reasons for disapproval.

(7) The director may not deny discharge of a youth that has attained the age of 18. The department may not pay for the care, custody or supervision of any delinquent youth that has attained age 18.

AUTH: 52-5-102, MCA  
IMP: 41-5-1516 and 41-5-1522, MCA

6. Concerned persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the address listed in paragraph 8, and must be received no later than December 21, 2000.

7. Colleen A. White, Rule Reviewer, will preside over and conduct the hearing.

8. The Department of Corrections maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices, and specifies that the person wishes to receive notices regarding community corrections, juvenile corrections, management services, board of pardons and parole, youth placement committees or general departmental rulemakings. Such written request may be mailed or delivered to Cj Johnson, Department of Corrections, 1539 11th Ave., Helena, Montana, 59620, faxed to 406-444-1976, e-mailed to [cjjohnson@state.mt.us](mailto:cjjohnson@state.mt.us), or by completing a request form at any rules hearing held by the Department of Corrections.

9. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

DEPARTMENT OF CORRECTIONS

/s/ Rick Day  
Rick Day, Director

/s/ Colleen A. White  
Colleen A. White, Rule Reviewer

Certified to the Secretary of State November 13, 2000

BEFORE THE MONTANA LOTTERY  
DEPARTMENT OF COMMERCE  
STATE OF MONTANA

In the matter of the amendment ) NOTICE OF AMENDMENT OF ARM  
of rules pertaining to the ) 8.127.407 RETAILER COMMIS-  
retailer commission and sales ) SION AND 8.127.1007  
staff incentive plan ) SALES STAFF INCENTIVE PLAN

TO: All Concerned Persons

1. On September 7, 2000, the Montana Lottery published a notice of the proposed amendment of rules pertaining to the retailer commission and sales staff incentive plan at page 2363, 2000 Montana Administrative Register, issue number 17.
2. The Montana Lottery has amended the rules exactly as proposed.
3. No comments or testimony were received.

THE MONTANA LOTTERY  
JERRY LACHERE, DIRECTOR

By: /s/ Annie M. Bartos  
ANNIE M. BARTOS, CHIEF COUNSEL  
DEPARTMENT OF COMMERCE

By: /s/ Annie M. Bartos  
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, November 13, 2000.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS  
OF THE STATE OF MONTANA

In the matter of the	)	
repeal of ARM 12.3.203,	)	
12.3.204, and 12.3.206;	)	
the adoption of new	)	
rules pertaining to	)	NOTICE OF REPEAL,
license agents; and the	)	ADOPTION, AND AMENDMENT
amendment of ARM	)	
12.3.106, 12.3.202,	)	
12.3.205, 12.3.209, and	)	
12.3.403	)	

TO: All Concerned Persons

1. On October 5, 2000, the Department of Fish, Wildlife and Parks (department) published notice of the proposed repeal, adoption, and amendment of the above stated rules at page 2570 of the 2000 Montana Administrative Register, Issue Number 19.

2. The department has repealed ARM 12.3.203, 12.3.204, and 12.3.206, adopted new rules I (12.3.201A), II (12.3.215), III (12.3.220), IV (12.3.225), V (12.3.230), and VI (12.3.235), and amended ARM 12.3.106, 12.3.202, 12.3.205, 12.3.209 and 12.3.403 exactly as proposed.

3. No comments or testimony were received.

By: /s/ Patrick J. Graham

PATRICK J. GRAHAM  
Director, Department of Fish,  
Wildlife and Parks

By: /s/ John F. Lynch

JOHN F. LYNCH  
Rule Reviewer

Certified to the Secretary of State November 13, 2000

BEFORE THE DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES OF THE  
STATE OF MONTANA

In the matter of the adoption	)	NOTICE OF ADOPTION,
of Rules I through VIII, the	)	TRANSFER, AMENDMENT
transfer and amendment of ARM	)	AND REPEAL
16.10.201, 16.10.202,	)	
16.10.203, 16.10.204,	)	
16.10.206, 16.10.207,	)	
16.10.208, 16.10.209,	)	
16.10.210, 16.10.212,	)	
16.10.213, 16.10.214,	)	
16.10.215, 16.10.216,	)	
16.10.217, 16.10.218,	)	
16.10.219, 16.10.220,	)	
16.10.221, 16.10.222,	)	
16.10.223, 16.10.225,	)	
16.10.226, 16.10.227,	)	
16.10.228, 16.10.229,	)	
16.10.230, 16.10.231,	)	
16.10.232, 16.10.236,	)	
16.10.238, 16.10.239,	)	
16.10.240, 16.10.241,	)	
16.10.242, 16.10.243,	)	
16.10.251 and the repeal of	)	
ARM 16.10.205, 16.10.233,	)	
16.10.234 and 16.10.235	)	
pertaining to food	)	
regulations	)	

TO: All Interested Persons

1. On August 24, 2000, the Department of Public Health and Human Services published notice of the proposed adoption, transfer and amendment and repeal of the above-stated rules at page 2206 of the 2000 Montana Administrative Register, issue number 16.

2. The Department has adopted new rules II [37.110.253], III [37.110.254], IV [37.110.255], VII [37.110.258] and VIII [37.110.259] as proposed.

3. The Department has amended and transferred rules 16.10.201 [37.110.201], 16.10.202 [37.110.202], 16.10.209 [37.110.209], 16.10.212 [37.110.212], 16.10.213 [37.110.213], 16.10.217 [37.110.217], 16.10.218 [37.110.218], 16.10.222 [37.110.222], 16.10.223 [37.110.223], 16.10.225 [37.110.225], 16.10.226 [37.110.226], 16.10.227 [37.110.227], 16.10.228 [37.110.228], 16.10.229 [37.110.229], 16.10.230 [37.110.230], 16.10.231 [37.110.231], 16.10.238 [37.110.238], 16.10.239 [37.110.239], 16.10.240 [37.110.240], 16.10.241 [37.110.241], 16.10.242 [37.110.242], 16.10.243 [37.110.243], 16.10.251

[37.110.251] and repealed rules 16.10.205, 16.10.233, 16.10.234 and 16.10.235 as proposed.

4. The Department has adopted the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

RULE I [37.110.252] HIGHLY SUSCEPTIBLE POPULATION (1) In a food service establishment that serves whose primary function is to serve a highly susceptible population as defined in ARM 37.108.203, the following food items may not be served:

(a) through (3)(b) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

RULE V [37.110.256] MOBILE FOOD SERVICE (1) through (6) remain as proposed.

(7) A mobile food service need not comply with the requirements in ARM 16.10.215 regarding cleaning and sanitizing equipment and utensils, if the mobile food service reports daily to an approved servicing area, and serves:

(a) only food prepared from approved sources, packaged in individual servings, and transported and stored under conditions meeting the requirements of this subchapter; or

(b) beverages that are not potentially hazardous and are dispensed from covered urns or other protected equipment; ~~or~~

~~(c) frankfurters.~~

(8) through (8)(c) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

RULE VI [37.110.257] PUSHCARTS (1) Pushcarts must operate in accordance with ARM 37.110.256~~(1) through (4) and (6) through (8)~~.

(2) remains as proposed.

(3) The servicing area must be constructed and equipped as follows:

(a) The floor surface of the servicing area must be constructed of a smooth nonabsorbent material, such as concrete or machine-laid asphalt and must be maintained in good repair, kept clean, and be graded to drain;

(b) through (d) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

5. The Department has amended the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

16.10.203 [37.110.203] DEFINITIONS For the purpose of this subchapter:

(1) through (25) remain as proposed.

(26) "Food service establishment" means an operation defined in 50-50-102(8), MCA, and includes an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption in a mobile, stationary, temporary, semipermanent or permanent facility or location; where consumption is on or off the premises and regardless of whether there is a charge for the food. Food service establishment does not include:

(a) through (c) remain as proposed.

(d) a food processing plant manufacturing establishment;

(e) through (30) remain as proposed.

(31) "Highly susceptible population" means a group of persons who are more likely than other populations to experience food borne disease because they have weak immune systems; including older adults in a facility that provides health care or assisted living services, such as a hospital or nursing home; such as patients and residents in a health care facility as provided in Title 50, chapter 5, MCA; older adults being served by such programs as meals on wheels, senior citizen centers, or similar programs; and children of preschool age in a facility that provides custodial care, such as a day care center as provided in ARM Title 37, chapter 95.

(32) through (53) remain as proposed.

(54) "Pushcart" means a non-self-propelled vehicle limited to serving non-potentially hazardous food, or wrapped food prepared beforehand in an approved food service establishment or food manufacturing establishment maintained at proper temperatures, or limited to the preparation and serving of frankfurters and dairy products.

(55) through (60) remain as proposed.

(61) "Safe temperature" means temperatures of 41°F (5°C) or below and 135°F (57.2°C) or above for perishable and potentially hazardous foods; 42°F through 45°F (5.5°C through 7°C) may also be considered safe if existing equipment cannot maintain 41°F (5°C) or below and food storage and display is reduced to a maximum of 4 days for ready-to-eat foods.

(62) through (81) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.204 [37.110.204] FOOD SUPPLIES (1) through (6) remain as proposed.

(7) Game animals and exotic species may be received for sale or service if raised, slaughtered, and processed under a voluntary inspection program that is conducted by the agency that has animal health jurisdiction. The inspection of game animals and exotic species must include an antemortem and postmortem examination by a veterinarian regulatory authority as provided in 81-9-230, MCA.

(8) through (10) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.206 [37.110.206] FOOD STORAGE AND PROTECTION

(1) Food must be stored as follows to prevent potential contamination:

(a) through (g) remain as proposed.

(h) Whole raw fruits or vegetables, cut raw vegetables such as celery or carrot sticks, cut potatoes, and tofu may be immersed in ice or water that is at a safe temperature.

(i) through (3) remain as proposed.

~~(4) The cooling of potentially hazardous food must be accomplished in the following manner:~~

~~(a) Cooked potentially hazardous food must be cooled as a continuous process:~~

~~(i) from 135°F (57.2°C) to 70°F (21°C) within 2 hours; and~~

~~(ii) from 70°F (21°C) to 41°F (5°C), or below, within 4 hours.~~

~~(b) Potentially hazardous food must be cooled to 41°F (5°C) or below, except as specified in ARM 16.10.203(61), within 4 hours if prepared from ingredients at ambient temperatures, such as reconstituted foods and canned tuna.~~

~~(c) A potentially hazardous food received in compliance with laws allowing a temperature above 41°F (5°C) during shipment from the supplier must be cooled to 41°F (5°C) or below, or to a temperature specified on the manufacturer's label, within 4 hours.~~

~~(d) Cooling must be accomplished in accordance with the time and temperature criteria specified in (4)(a) through (c) of this rule using one or more of the following methods based on the type of food being cooled:~~

~~(i) placing the food in shallow pans;~~

~~(ii) separating the food into smaller or thinner portions;~~

~~(iii) using rapid cooling equipment;~~

~~(iv) stirring the food in a container placed in an ice water bath;~~

~~(v) using containers that facilitate heat transfer;~~

~~(vi) adding ice as an ingredient; or~~

~~(vii) other effective methods.~~

~~(e) When placed in cooling or cold holding equipment, food containers in which food is being cooled must be arranged in the equipment to provide maximum heat transfer through the container walls and must be loosely covered. However, food may be uncovered if it is protected from overhead contamination during the cooling period to facilitate heat transfer from the surface of the food.~~

~~(5) through (8) remain as proposed but are renumbered (4) through (7).~~

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.207 [37.110.207] FOOD PREPARATION (1) through (3) remain as proposed.

(4) The following are requirements for the destruction of organisms of public health concern:

(a) Raw animal foods such as eggs, fish, poultry, meat, and foods containing these raw animal foods, must be cooked to heat all parts of the food to the following minimum internal temperatures as measured by temperature measuring devices for the specified times listed below:

<u>Item</u>	<u>Temperature</u>	<u>Time</u>
Fish and meat	145°F (63°C)	for 15 sec
Shell eggs individually ordered for immediate service	145°F (63°C)	for 15 sec
<del>Bulk style on buffet or hot line</del>		
<u>Shell eggs prepared for other than individual order for immediate service</u>	155°F (68°C)	for 15 sec
<del>Pork products</del>	<del>145°F (63°C)</del>	<del>for 3 min</del>
<del>Comminuted (ground) beef and fish, exotic game, and injected meats (Choose any one)</del>	<del>145°F (63°C)</del> <del>150°F (66°C)</del>	<del>for 3 min</del> <del>for 1 min</del>
<u>Pork products</u>	<u>145°F (63°C)</u>	<u>for 15 sec</u>
<u>Comminuted (ground) beef, pork and fish, exotic game, and injected meats (Choose any one)</u>	<u>145°F (63°C)</u> <u>150°F (66°C)</u> <u>155°F (68°C)</u> <u>158°F (70°C)</u>	<u>for 3 min</u> <u>for 1 min</u> <u>for 15 sec</u> <u>for &lt;1 sec</u>

Poultry, wild game, stuffed fish, stuffed meat, stuffed pasta, stuffed poultry, stuffed ratites, or stuffing containing fish, meat, poultry, or ratites 165°F (74°C) for 15 sec

(b) Whole beef roasts, corned beef roasts, pork roasts, and cured pork roasts such as ham must be cooked:

(i) in an oven that is preheated to the temperature specified for the roast's weight in the following chart and that is held at that temperature;

<u>Oven type</u>	<u>Roast size: under 10 pounds</u>	<u>over 10 pounds</u>
<del>Still dry oven</del>	<del>350°F (177°C)</del>	<del>250°F (121°C)</del>
<del>Convection oven</del>	<del>325°F (163°C)</del>	<del>325°F (163°C)</del>
<del>High humidity (&gt;90% for 1 hour); and</del>	<del>250°F (121°C)</del>	<del>250°F (121°C)</del>
<u>Still dry oven</u>	<u>350°F (177°C)</u>	<u>250°F (121°C)</u>
<u>Convection oven</u>	<u>325°F (163°C)</u>	<u>250°F (121°C)</u>
<u>High humidity (&gt;90% for 1 hour); and</u>	<u>250°F (121°C)</u>	<u>250°F (121°C)</u>

(ii) through (6) remain as proposed.

(7) The cooling of potentially hazardous food must be accomplished in the following manner:

(a) Cooked potentially hazardous food must be cooled as a continuous process:

(i) from 135°F (57.2°C) to 70°F (21°C) within 2 hours; and

(ii) from 70°F (21°C) to 41°F (5°C), or below, within 4 hours, or 45°F (7°C) or below as provided in ARM 37.110.203(61).

(b) Potentially hazardous food must be cooled to 41°F (5°C) or below, except as specified in ARM 37.110.203(61), within 4 hours if prepared from ingredients at ambient temperatures, such as reconstituted foods and canned tuna.

(c) A potentially hazardous food received in compliance with laws allowing a temperature above 41°F (5°C) during shipment from the supplier must be cooled to 41°F (5°C) or below, or 45°F (7°C) or below, as provided in ARM 37.110.203(61) or to a temperature specified on the manufacturer's label, within 4 hours.

(d) Cooling must be accomplished in accordance with the time and temperature criteria specified in (4)(a) through (c) of this rule using one or more of the following methods based on the type of food being cooled:

(i) placing the food in shallow pans;

(ii) separating the food into smaller or thinner portions;

(iii) using rapid cooling equipment;

(iv) stirring the food in a container placed in an ice water bath;

(v) using containers that facilitate heat transfer;

(vi) adding ice as an ingredient; or

(vii) other effective methods.

(e) When placed in cooling or cold holding equipment, food containers in which food is being cooled must be arranged in the equipment to provide maximum heat transfer through the container walls and must be loosely covered. However, food may be uncovered if it is protected from overhead contamination during the cooling period to facilitate heat transfer from the surface of the food.

(7) remains as proposed but is renumbered (8).

~~(8) (9) The following are approved methods of parasite destruction by freezing:~~

~~(a) Except as specified in (8)(b) of this rule, raw, raw-marinated, partially cooked, or marinated-partially cooked fish other than molluscan shellfish that is served in ready-to-eat form must be frozen throughout to a temperature of:~~

~~(i) through (b) remain as proposed.~~

~~(9) (10) Potentially hazardous food may not be held at temperatures above 45°F (7°C) for refrigerated food, or below 135°F (57.2°C) for heated food, for more than:~~

~~(a) 4 hours, including the time needed for preparation for cooking; or~~

~~(b) the time it takes under refrigeration to lower the food temperature to 45°F (7°C); or~~

~~(c) (b) the time specified in the cooling criteria in ARM 16.10.206(4) (7) of this rule.~~

~~(10) and (11) remain as proposed but are renumbered as (11)~~

and (12).

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.208 [37.110.208] FOOD DISPLAY AND SERVICE (1)  
remains as proposed.

(2) Ice for consumer use must be dispensed only by food employees with scoops, tongs, or other ice-self-dispensing utensils or through automatic self service ice-dispensing equipment. Ice-dispensing utensils must be stored on a clean surface or in the ice with the dispensing utensil's handle extended out of the ice. Between uses, ice transfer receptacles must be stored in a way that protects them from contamination. Ice storage bins shall be drained through an air gap. Liquid water drain lines may not pass through an ice machine or ice storage bin unless the tubes are properly shielded or separated from the potable ice.

(3) Food must be protected from contamination by equipment, utensils, and wiping cloths by:

~~(a) preventing contact with probe-type price or identification tags;~~

(b) ~~(a)~~ preventing contact with wiping cloths that do not meet the requirements in ARM 37.110.215(6) through (8);

~~(c) (b)~~ preventing contact with surfaces of utensils and equipment that are not cleaned and sanitized;

~~(d) (c)~~ ensuring utensils are stored properly during pauses in food preparation or dispensing, as follows:

(i) except as specified in (3)~~(b) (a)~~, in the food with their handles above the top of the food and the container;

(ii) through (iv) remain as proposed.

(v) cleaning, sanitizing, and air drying between uses.

(4) through (5)~~(c)~~ remain as proposed.

(6) Date marking and disposition of ready-to-eat potentially hazardous food must be handled in the following manner:

(a) through (ii) remain as proposed.

(b) A container of refrigerated, ready-to-eat, potentially hazardous food prepared and packaged by a food processing plant manufacturing establishment must be clearly marked to indicate the date by which the food must be consumed:

(i) through (d) remain as proposed.

(e) Subsection (6)(b) of this rule does not apply to whole, unsliced portions of a cured and processed food product with original casing maintained on the remaining portion, such as bologna, salami, or other sausage in a cellulose casing.

(7) through (e) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.210 [37.110.210] FOOD EMPLOYEES (1) through (4)(j)  
remain as proposed.

(5) If used, chemical hand sanitizers must:

(a) have active antimicrobial ingredients that are listed as safe and effective for application to human skin as an antiseptic handwash pursuant to the U.S. food and drug administration's regulations for over-the-counter health-care antiseptic drug products; or and

(b) through (7)(f) remain as proposed.

(i) Subsection (7)(f) does not apply to food employees such as counter staff who only serve beverages and wrapped or packaged foods, hostesses, and wait staff if they present a minimal risk of contaminating exposed food, clean equipment, utensils, linens, and unwrapped single-service and single-use articles.

(8) remains as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.214 [37.110.214] EQUIPMENT INSTALLATION AND LOCATION

(1) General equipment, including ice makers and ice storage equipment, may not be located under exposed or unprotected sewer lines or water lines, open stairwells, or other sources of contamination. This requirement does not apply to automatic fire protection sprinkler heads that ~~may be required by the Montana state fire marshal or the fire marshal's authorized agent.~~

(2) Equipment that is placed on tables or counters, unless portable easily movable, must be sealed to the table or counter or elevated on legs to provide at least a 4-inch clearance between the table or counter and equipment and shall be installed to facilitate the cleaning of the equipment and adjacent areas.

(3) Equipment is portable easily movable within the meaning of (2) of this rule if:

(i) and (ii) remain as proposed.

(4) Floor-mounted equipment, unless readily easily movable, must be:

(a) through (c) remain as proposed.

~~(5) Equipment is easily movable if:~~

~~(a) it is mounted on wheels or casters; and~~

~~(b) it has no utility connection or has a utility connection that disconnects quickly, or has a flexible utility line of sufficient length to permit the equipment to be moved for easy cleaning.~~

(6) and (7) remain as proposed but are renumbered (5) and (6).

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.215 [37.110.215] EQUIPMENT AND UTENSIL CLEANING AND SANITATION (1) through (13) remain as proposed.

(14) The food contact surfaces of all equipment and utensils must be sanitized by:

(a) immersion for at least ~~1/2 minute~~ 30 seconds in clean,

hot water at a temperature of at least 170°F (77°C); or

(b) immersion for at least ~~1 minute~~ 30 seconds in a clean solution containing at least 50 parts per million but not more than ~~200~~ 100 parts per million of available chlorine as a hypochlorite and at a temperature of at least 75°F (24°C); or

(c) immersion for at least ~~1 minute~~ 30 seconds in a clean solution containing at least 12.5 parts per million but not more than 25 parts per million of available iodine and having a pH not higher than 5.0 and at a temperature of at least 75°F (24°C); or

~~(d) using a quaternary ammonium compound solution by following manufacturer's instructions;~~

(d) immersion for at least 30 seconds in a clean solution containing no more than 200 parts per million of quaternary ammonium compound used by following manufacturer's instructions;

(e) immersion in a clean solution containing any other chemical sanitizing agent approved by the EPA that will provide the equivalent bactericidal effect of a solution containing at least 50 parts per million of available chlorine as a hypochlorite at a temperature of at least 75°F (24°C) for ~~1 minute~~ 30 seconds;

(f) remains as proposed.

(g) rinsing, spraying, or swabbing with a chemical sanitizing solution of at least twice the strength required for that particular sanitizing solution under (14)(a) through (e) of this rule in the case of equipment too large to sanitize by immersion.

(15) through (28) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.216 [37.110.216] EQUIPMENT AND UTENSIL STORAGE

(1) through (4) remain as proposed.

(5) Single-service articles must be stored at least 6 inches above the floor in closed cartons or containers which protect them from contamination and may not be placed under exposed sewer lines or water lines, except for automatic fire protection sprinkler heads that ~~may be required by law.~~

(6) through (8) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.219 [37.110.219] PLUMBING (1) through (5) remain as proposed.

(6) ~~Except for properly trapped open sinks, there~~ There may not be a direct connection between the sewerage system and any drains originating from equipment in which food, portable equipment, or utensils are placed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.220 [37.110.220] TOILET FACILITIES (1) Toilet facilities must be provided for food employees and other authorized persons. These toilet facilities must be conveniently located and readily accessible to food employees and other authorized persons during all times the establishment is in operation. Conveniently located as related to toilet facilities shall mean means located in the same building as the food service establishment within 200 feet by a normal pedestrian route of all locations of the food service operation and not more than one floor-to-floor flight of stairs.

(2) through (9) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.221 [37.110.221] HAND WASHING FACILITIES

(1) through (8) remain as proposed.

(9) A supply of disposable towels in a wall-hung or protected container, ~~clean continuous towel system~~ a continuous towel system that supplies the user with a clean towel, or a hand drying device providing heated air must be conveniently located near each hand washing facility. Common towels are prohibited. When disposable towels are used, easily cleanable waste receptacles must be conveniently located near the hand washing facility.

(10) remains as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.232 [37.110.232] PREMISES (1) through (5) remain as proposed.

(6) Laundry facilities in a food service establishment must be restricted to the washing and drying of linens, cloths, uniforms and aprons necessary to the operation. If such items are laundered on the premises, an electric or gas dryer must be provided and used.

(a) remains as proposed.

(b) A mechanical washer and dryer is not required if on-premise laundering is limited to wiping cloths. The wiping cloths may be laundered in a warewashing or ~~food preparation~~ service sink that is cleaned before and after use. If air-dried, the cloths must be dried in a location that prevents the contamination of food, equipment, utensils and linens.

(7) through (11)(e)(iii) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

16.10.236 [37.110.236] TEMPORARY FOOD SERVICE ESTABLISHMENTS (1) through (7) remain as proposed.

(8) Enough potable water that complies with ARM 37.110.217(3) must be available in the establishment for food preparation, for cleaning and sanitizing utensils and equipment,

and for hand washing. A heating facility capable of producing enough hot water for these purposes shall be provided on the premises.

(9) through (14) remain as proposed.

AUTH: Sec. 50-50-103, MCA

IMP: Sec. 50-50-103, MCA

6. The Department has thoroughly considered all commentary received. The comments received and the Department's response to each follow:

COMMENT #1: One Commentor objected to new Rule I [37.110.252] applying to restaurants.

RESPONSE: New Rule I [37.110.252] is meant to regulate food served in health care facilities and day care centers, not restaurants. For clarity, the Department agreed to make wording changes to new Rule I(1) [37.110.252]. For clarity, the Department agreed to make wording changes to new Rule I(1) [37.110.252] by clarifying that the rule applies to food service establishments "whose primary function is to serve a highly susceptible population". Changes were also made to the definition of "highly susceptible population" in ARM 16.10.203(31) [37.110.203] by inserting language that the population consists of "patients in a health care facility as provided in Title 50, chapter 5, MCA; older adults being served by such programs as Meals on Wheels, senior citizens centers, or similar programs; and children of preschool age in a day care center as provided in ARM Title 37, chapter 95."

COMMENT #2: An objection was made to allow mobile food services, pushcarts, and semi-permanent establishments, as provided in new Rule V [37.110.256], VI [37.110.257] and VII [37.110.258], to use septic pumpers because of the unsanitary method of hauling sewage. The Commentor wanted these establishments to have permanent sewage systems.

RESPONSE: New Rule V(8) [37.110.256] allows local health authorities the flexibility to "impose additional requirements to protect against health hazards related to the conduct of the mobile food service" if they so choose. No other changes will be made requiring permanent sewage systems because some local health authorities allow licensed septic pumpers and have no health concerns with this practice.

COMMENT #3: A Commentor objected to the allowance of approved water haulers to service mobile food services, pushcarts, and semi-permanent establishments, seen in new Rule V(6) [37.110.256], because there is no clear regulatory oversight of water haulers. The Commentor pointed out that the Montana Department of Environmental Quality will not approve water haulers that serve less than 25 people less than 60 days out of the year per their legal definition of a "public water supply";

that the Montana Department of Public Health and Human Services will not regulate water haulers as food service establishments; and that the counties do not have authority to regulate water haulers. The Commentor asked that the Department of Public Health and Human Services regulate water haulers under its rules for bottled water and ice found in ARM Title 16, chapter 10, subchapter 5.

RESPONSE: The Montana Department of Environmental Quality (DEQ) has specific laws regulating water haulers, seen in Title 75, chapter 6, MCA, and ARM Title 17, chapter 38, subchapter 5. There are no such statutes and regulations delegating this function to the Department of Public Health and Human Services. New Rule V(6) [37.110.256] requires water haulers to be approved, meaning those approved by DEQ, and non-DEQ approved water haulers are not permitted under the rule.

COMMENT #4: A Commentor asked that new Rule V(7) [37.110.256] be reworded as follows: "A mobile food service need not comply with the requirements...if the mobile food service serves: (a) only food prepared in a licensed kitchen, prepackaged in individual servings...(d) and the required equipment for cleaning and sanitizing exists at the licensed kitchen".

RESPONSE: Changes were made to new Rule V(7)(a) [37.110.256] with the added language that the exemptions apply to mobile food services serving only food "from approved sources". Having food items derived from approved sources in new Rule V(7)(a) [37.110.256] covers both food prepared in an approved kitchen and food from approved manufacturing establishments, and assures that the food is prepared in a fashion that does not put the consuming public at risk of food borne illness outbreaks.

COMMENT #5: A Commentor questioned whether the provision in new Rule V(7) [37.110.256] exempting mobile food services from the requirements in ARM 16.10.215 [37.110.215] regarding equipment and utensil cleaning and sanitizing daily was detrimental to public health.

RESPONSE: New language was added to new Rule V(7) [37.110.256] by exempting a mobile food service that "reports daily to an approved servicing area". Having the mobile food service report daily to a servicing area will help alleviate any concerns that the mobile food service is not cleaning and sanitizing to protect public health.

COMMENT #6: A Commentor proposed inserting the word "only" after "frankfurters" in new Rule V(7)(c) [37.110.256].

RESPONSE: The Department elected to eliminate "frankfurters" in new Rule V(7)(c) [37.110.256] because of current scientific proof that processed meats that are subjected to temperature abuses carry the risk of lysteria monocytogenese.

COMMENT #7: A Commentor wanted county inspections to be uniform across the different counties when inspecting mobile food establishments, pushcarts, and semi-permanent establishments provided in new rules V [37.110.256], VI [37.110.257], and VII [37.110.258].

RESPONSE: The Department believes that the changes made in new Rule V(7) [37.110.256] will help alleviate this concern because it will apply uniformly from county to county. See responses for Comments #4, 5 and 6.

COMMENT #8: A Commentor questioned whether new Rule V(5) [37.110.256] should apply to pushcarts under new Rule VI [37.110.257]. The Commentor pointed out that new Rule VI [37.110.257] requires compliance with new Rule V(1) through (4) and (6) through (8) [37.110.256].

RESPONSE: The Department agrees. Changes were made to new Rule VI [37.110.257] so that pushcarts must also comply with new Rule V(5) [37.110.256].

COMMENT #9: A Commentor asked that new Rule VI(3)(a) [37.110.257] be clarified with "the floor surface of the servicing area..."

RESPONSE: The Department agrees. The word "floor" was added to new Rule VI(3)(a) [37.110.257].

COMMENT #10: A Commentor objected to the allowance of semi-permanent establishments in new Rule VII [37.110.258] because allowing them may encourage improper sanitary practices regarding warewashing and handwashing. The Commentor said that if the wastewater holding tank is full and there are consumers waiting, there is the possibility that no handwashing will take place. Also, the Commentor said the semi-permanent establishments cannot be moved in order to facilitate the dumping of wastewater, which forces the hauling of wastewater which is not an easy task. Further, the Commentor said a semi-permanent structure may be contrary to building codes.

The Commentor said that there are those who may follow the regulations, but there are also some that will resort to short cuts, and a local health authority's policing semi-permanent establishments will be problematic. The Commentor supported having permanent connections for water and a sanitary waste system in Rule VII [37.110.258].

RESPONSE: The Department recognizes that some local health authorities do not believe semi-permanent structures should be approved in their jurisdictions. The local health authorities are allowed this discretion in new Rule V(8) [37.110.256].

COMMENT #11: A Commentor suggested a separate definition for "seafood" in ARM 16.10.203 [37.110.203], and asked it to be

defined as follows: "'Seafood' means edible forms of aquatic animal life other than birds or mammals, encompassing both fresh and saltwater forms, and including molluscan shellfish and crustaceans." This wording was suggested to eliminate the term "fish" which is not all-encompassing as the commenter's proposed definition.

RESPONSE: The Department sees no need for a separate definition of "seafood" because the definitions in ARM 16.10.203 [37.110.203] make distinctions between the different kinds of seafood: ARM 16.10.203(20) [37.110.203] defines "fish"; (41) defines "molluscan shellfish"; (68) defines "shellstock"; and (69) defines "shucked shellfish". These definitions are supplied to differentiate between the different kinds of seafood and the differing requirements in the ensuing rules.

COMMENT #12: Several comments were received objecting to the change of "employee" to "food employee", found in ARM 16.10.203(24) [37.110.203], because non-food employees in health care facilities need to prepare food during hours when no food employees are around, and activities employees need to prepare food for resident activities.

RESPONSE: The Department disagrees with the proposal. The definition of "food employee" and its requirements apply to all employees involved in preparation of foods and the handling of items and surfaces associated with food preparation. It does not restrict the handling of food to employees as related to job descriptions in a given place of employment.

COMMENT #13: A Commentor had problems with the definition of "food service establishment" found in ARM 16.10.203(26) [37.110.203] because it encompassed establishments that served food "regardless of whether there is a charge for the food." Since food service establishments must be licensed, the definition as it is stated in ARM 16.10.203(26) [37.110.203] appears to mean that food banks, churches, food offered in grand openings, and schools must be licensed.

RESPONSE: The authority to find what kinds of food service establishments must be licensed is in Title 50, chapter 50, MCA, not in the food regulations. Section 50-50-202, MCA, provides that a license is not required for a subdivision of state government, food establishments operated by a non-profit organization that operates less than 14 days in one calendar year; a gardener or farmer who sells raw and unprocessed farm products at farmer's markets; and persons selling baked goods or preserves at farmer's markets.

COMMENT #14: A Commentor asked that the term "food processing plant" in the definition found in ARM 16.10.203(26) [37.110.203] be changed to "food manufacturing plant" since the proposed rules seek to eliminate "food processing plant" in the original ARM 16.10.203(13) [37.110.203].

RESPONSE: The Department agrees. The suggested change was made.

COMMENT #15: A Commentor suggested that the wording "that consists in whole or in part of milk and milk products, eggs, meat, poultry" be retained for the definition of "potentially hazardous food" found in ARM 16.10.203(51) [37.110.203].

RESPONSE: There are some food items that contain dairy products and meat that are shelf-stable and are not considered potentially hazardous food. Therefore, the Department elected not to retain the original wording for defining "potentially hazardous food".

COMMENT #16: A Commentor commented that the provision of exempting food as not potentially hazardous through a variance granted by the Department, as found in ARM 16.10.203(51)(c)(v) [37.110.203], does not indicate the application process for a variance.

RESPONSE: New Rule II [37.110.253] provides the information regarding the application and granting of a variance, therefore it is unnecessary to supply this information in the definition.

COMMENT #17: A Commentor asked for a separate definition for "dairy products" because the way the term is used in the definition of "pushcarts" in ARM 16.10.203(54) [37.110.203(54)] is written as if dairy products are not considered potentially hazardous food.

RESPONSE: The Department elected to change the definition of "pushcart" found in ARM 16.10.203(54) [37.110.203] by eliminating the words "or limited to the preparation of serving frankfurters and dairy products".

COMMENT #18: A Commentor commented that the term "regulatory authority" found in ARM 16.10.203(60) [37.110.203] does not clarify a method to resolve enforcement interpretations between local health authorities and the Department.

RESPONSE: Montana has a dual-system of regulatory control for food service establishments: local and state. However, the Department provides standardization training on the interpretation of the food service regulations to local health authorities. New Rule II [37.110.253] allows for appeal to the state Department.

COMMENT #19: A Commentor suggested that "42°F through 45°F" be inserted in the "safe temperature" definition in ARM 16.10.203(61) [37.110.203]. The definition only said "42°F".

RESPONSE: The Department agrees. The correction was made to ARM 16.10.203(61) [37.110.203].

COMMENT #20: A Commentor asked that the hot temperature of 135°F be lowered to 130°F as a "safe temperature" for ARM 16.10.203(61) [37.110.203]. The academic community, food scientists, and others in the food regulation community have determined that 130°F is microbiologically safe as a hot holding temperature, and South Carolina has used 130°F for a number of years without any problems.

RESPONSE: The Department disagrees with lowering the safe holding temperature for hot potentially hazardous food to 130°F. The original hot holding temperature was set at 140°F. The Department is aware that some scientific authorities exist that show hot holding potentially hazardous food at 130°F is safe. However, the intent of the rule is to provide a cushion in temperature control since food items do not hold consistent temperatures throughout the body of the food being hot held. The Department and the food code task force settled on 135°F as a compromise when drafting the rule.

COMMENT #21: A Commentor pointed out that antemortem and postmortem examinations by veterinarians, provided in ARM 16.10.204(7) [37.110.204], are no longer used in the state regulation of inspecting game animals and exotic species. The Commentor asked that the following wording be used in ARM 16.10.204(7) [37.110.204]: "The inspection of game animals and exotic species must include an antemortem and postmortem examination by a regulatory authority as provided by 81-9-230, MCA."

RESPONSE: The Department agrees. The suggested change was made.

COMMENT #22: A Commentor recommended that the raw fruits and vegetables, cut raw vegetables, and tofu be immersed in ice or water "that is at a safe temperature" for ARM 16.10.206(1)(h) [37.110.260]. The Commentor asserted that having this language will help assure that the water is sufficiently cold to prevent microbiological growth.

RESPONSE: The Department agrees. The suggested change was made.

COMMENT #23: A Commentor questioned whether the hours listed in ARM 16.10.206(4)(a) [37.110.206] was too long a cooling time. The Commentor said the provision as written allows cooling of potentially hazardous food by cooling from 135°F to 70°F in two hours, and from 70°F to 41°F in four hours. The Commentor believed that the 1999 U.S. Food Code provides for food to be cooled a total of four hours, not six.

RESPONSE: The Department disagrees. The language in ARM 16.10.206(4)(a) [37.110.206] almost word-for-word comes directly from the 1999 U.S. Food Code language in paragraph 3-501.14 (A), which provides that potentially hazardous food be cooled "(1)

Within 2 hours, from 60°C (140°F) to 21°C (70°F), and (2) Within 4 hours, from 21°C (70°F) to 5°C (41°F) or less, or to 7°C (45°F) as specified under paragraph 3-501.16(C) [emphasis supplied as underlined]". The four-hour limitation occurs when food is prepared from ingredients at ambient temperatures, which is provided in ARM 16.10.206(4)(b) [37.110.206]. In reviewing the 1999 U.S. Food Code provision, the Department found that the provision allowed for cooling temperatures to be 41°F or below or 45°F or below and ARM 16.10.206(4) [37.110.206] (now 16.10.207(7) [37.110.207]) did not. The Department changed ARM 16.10.206(4) [37.110.206] (now 16.10.207 [37.110.207]) to reflect the U.S. Food Code's language by inserting 45°F.

COMMENT #24: A Commentor asked whether ARM 16.10.206(4) [37.110.206] would be better placed in ARM 16.10.207 [37.110.207]: Food Preparation.

RESPONSE: The Department agrees. ARM 16.10.206(4) [37.110.206] was moved to ARM 16.10.207(7) [37.110.207], after the provisions regarding cooking and prior to the provisions regarding reheating.

COMMENT #25: A Commentor suggested that ARM 16.10.206(8) [37.110.206] regarding power outages be qualified or quantified. The Commentor said many rural locations experience outages essentially daily with some being several times per day, and ARM 16.10.206(8) [37.110.206] as written would require reporting to the local health authorities each time an outage occurs which may not be necessary.

RESPONSE: The Department disagrees. ARM 16.10.206(8) [37.110.206] qualifies when it is necessary to report to a regulatory authority when power outages occur. It states that an outage is reportable when it "might result in the contamination of food, or that might prevent potentially hazardous food from being held at required temperatures". A power outage that lasts for a day would certainly qualify as being reportable, but a outage lasting one or two hours may not depending on the food item.

COMMENT #26: A Commentor suggested that in ARM 16.10.207(4)(a) [37.110.207], the temperatures for "bulk style on buffet or hot line" be clarified to include "eggs not being cooked to order for immediate service". The Commentor also suggested including the temperature of 158°F for less than one second as an acceptable alternative for cooking comminuted meats, and other items be allowed 155°F for 15 seconds.

RESPONSE: The Department agrees. The suggested change was made to ARM 16.10.207(4)(a) [37.110.207].

COMMENT #27: A Commentor asked that "comminuted pork" be added in ARM 16.10.207(4)(a) [37.110.207] with the time and temperatures for comminuted beef.

**RESPONSE:** The Department agrees. The suggested change was made to ARM 16.10.207(4)(a) [37.110.207].

**COMMENT #28:** A Commentor asked that the requirements in ARM 16.10.207(4)(a) [37.110.207] be better drafted for easier readability and understandability.

**RESPONSE:** The Department disagrees. The Department altered the food preparation time and temperature requirements listed in section 3-401.11 of the 1999 U.S. Food Code without altering the provision's content. The U.S. Food Code's provision was felt to be confusing. Also, the Department felt that the current layout and wording of ARM 16.10.207(4)(a) [37.110.207] provided clearer instructions to cooks on the time and temperature requirements.

**COMMENT #29:** A Commentor pointed out that the temperatures and times in ARM 16.10.207(4)(a) and (b) [37.110.207] do not correlate with those in the 1999 U.S. Food Code.

**RESPONSE:** The Department agrees. The Department altered the content of ARM 16.10.207(4)(a) and (b) [37.110.207] to reflect the times and temperatures contained in section 3-401.11 of the 1999 U.S. Food Code.

**COMMENT #30:** A Commentor said that the temperature for cooking roasts over ten pounds in conventional ovens is incorrect in ARM 16.10.207(4)(b) [37.110.207], and that the temperature should be 250°F, not 325°F.

**RESPONSE:** The Department agrees. The temperature change was made.

**COMMENT #31:** A Commentor asked if it was plausible for a consumer to order a "raw" hamburger under ARM 16.10.207(4)(c) [37.110.207].

**RESPONSE:** Yes, a consumer can order a raw hamburger as stated in ARM 16.10.207(4)(c) [37.110.207].

**COMMENT #32:** A Commentor suggested better wording for ARM 16.10.207(4)(c) [37.110.207] would be as follows: "When raw or partially cooked animal foods are requested by a consumer, subsections (a) and (b) of this rule do not apply".

**RESPONSE:** The Department disagrees. The wording in ARM 16.10.207(4)(c) [37.110.207] contains more detail than the Commentor's proposal, and includes "foods containing these raw or partially cooked animal foods".

**COMMENT #33:** A Commentor asked that a new subsection be added under ARM 16.10.207(4)(d) [37.110.207] as "(iii)" requiring that the whole muscle intact beef steak be labeled as such.

**RESPONSE:** The Department disagrees. There is no federal

labeling requirement that mandates whole muscle intact beef steak be labeled as such.

COMMENT #34: A Commentor objected to ARM 16.10.207(8)(a) [37.110.207], providing for freezing as a method of parasite destruction of fish when a food service establishment must obtain and keep fresh fish for sushi.

RESPONSE: ARM 16.10.207(8)(b) [37.110.207] contains an exception for freezing fish if the fish is tuna of the species *Thunnus alalunga*, *Thunnus albacares* (yellowfin tuna), *Thunnus atlanticus*, *Thunnus maccoyii* (bluefin tuna, southern), *Thunnus obesus* (bigeye tuna), or *Thunnus thynnus* (bluefin tuna, northern). These species are commonly used in preparing sushi. All other species of fish must be frozen according to ARM 16.10.207(8)(a) [37.110.207] to minimize the risk of illness due to parasites that may exist in these species of fish.

COMMENT #35: A Commentor asked that the word "raw" be added before "raw-marinated" in ARM 16.10.207(8)(a) [37.110.207].

RESPONSE: The Department agrees. The word "raw" was added.

COMMENT #36: A Commentor asked that the wording in ARM 16.10.207(9) [37.110.207] reflect the language pertaining to that provision in the 1999 U.S. Food Code.

RESPONSE: The Department disagrees because it was determined that ARM 16.10.207(9) [37.110.207] (which has been renumbered as (10)) did not conflict with its counterpart in the 1999 U.S. Food Code in section 3-501.14.

COMMENT #37: A Commentor said ARM 16.10.207(9) [37.110.207] was difficult to understand, and suggested the following language: "Potentially hazardous food may not be held at temperatures above 40°F for refrigerated food or below 135°F for heated food for more than four hours, including the time needed for preparation, cooking, cooling, and reheating, except: (a) as specified in the cooling criteria in ARM 16.10.206(4) [37.110.206]; or (b) when using time as a public health control as specified in ARM 16.10.208(7) [37.110.208]." The processes of reheating are addressed separately in ARM 16.10.207(7) [37.110.207] now 16.10.207(8) [37.110.207].

RESPONSE: The Department disagrees. First, the Department is not in agreement that 40°F be used as a temperature ceiling for refrigerated food. Second, the Department feels that the added language "the time needed for preparation, cooking, cooling, and reheating" actually reduces the allowable time in the four hour requirement in ARM 16.10.207(9)(a) [37.110.207] (now renumbered as (10)(a)). As written, ARM 16.10.207(9)(a) [37.110.207] (now (10)(a)) specifies that food not be held outside of safe temperatures for more than "four hours, including the time needed for preparation for cooking". Cooling and reheating are

covered under separate subsections in ARM 16.10.207 [37.110.207].

COMMENT #38: A Commentor said that ARM 16.10.207(9) [37.110.207] as written was not clear, and suggested the following language: "Potentially hazardous food may not be held at temperatures between 45°F and 135°F for more than four hours: (a) during preparation and cooking; and (b) during cooling unless cooled under the criteria specified in ARM 16.10.206(4) [37.110.206]".

RESPONSE: The Department agrees. Changes were made to ARM 16.10.207(9) [37.110.207] (now (10)) by eliminating the language that food could not be held at unsafe temperatures for more than "the time it takes under refrigeration to lower the food temperature to 45°F (7°C)".

COMMENT #39: A Commentor asked that the language in ARM 16.10.207(9)(b) [37.110.207] be changed to: "the time specified in the cooling criteria in ARM 16.10.206(4) [37.110.206]".

RESPONSE: The Department agrees. See response for Comment #38. The reference to "ARM 16.10.206(4) [37.110.206]" was changed to subsection "(7) of this rule".

COMMENT #40: A Commentor asked whether 41°F should be added in place of 45°F in ARM 16.10.207(9) [37.110.207] to maintain consistency throughout the rules.

RESPONSE: The Department disagrees. The Department opted for temperatures above 45°F and below 135°F as those not appropriate to holding potentially hazardous foods safely. The Department considers 45°F or colder a safe temperature to hold potentially hazardous foods.

COMMENT #41: Two comments were received asking that ARM 16.10.208(2) [37.110.208] be consistent with ARM 16.10.213(4) [37.110.213] by prohibiting liquid water drain lines to pass through the ice machine or ice storage bin "unless the tubes are properly shielded or separated from the potable ice".

RESPONSE: The Department agrees. The wording in ARM 16.10.208(2) [37.110.208] was changed accordingly.

COMMENT #42: A Commentor asked that ARM 16.10.208(3) [37.110.208] permit, not prohibit, the use of probe-type price tags, and asked that the language regarding these price tags be adopted from the 1999 U.S. Food Code, which allows these price tags if easily cleanable and properly washed, rinsed, and sanitized.

RESPONSE: The Department agrees. ARM 16.10.208(3)(a) [37.110.208] was eliminated, and probe-type price tags will be regulated under ARM 16.10.208(3)(c) [37.110.208] (now changed to

(3)(b)).

COMMENT #43: A Commentor recommended that ARM 16.10.208(3)(d)(v) [37.110.208] have the word "air" inserted, as in "cleaning, sanitizing, and air drying between uses".

RESPONSE: The Department agrees. The rule was changed accordingly.

COMMENT #44: A Commentor had concerns over the two different date and temperature standards listed in ARM 16.10.208(6) [37.110.208], and also had concerns because the U.S. Food and Drug Administration exempted from the date requirements commercially packaged cheeses and cured meats that have been opened but are still in the cellulose casing around the products.

RESPONSE: The language in ARM 16.10.208(6) [37.110.208] comes directly from the 1999 U.S. Food Code, found in section 3-501.17, therefore no changes to the two date and temperature standards will be made. The Department, however, recognizes that ARM 16.10.208(6) [37.110.208] does not include the 1999 U.S. Food Code's exclusion for whole, unsliced portions of cured and processed food with original casing, therefore (6)(e) was added.

COMMENT #45: A Commentor asked that all potentially hazardous foods that have been prepared and not stored in their original containers be labeled under ARM 16.10.208(6) [37.110.208], not just those that may be held for more than 24 hours.

RESPONSE: The Department recognizes that local health authorities may impose stricter requirements than those contained in the Department's rules, as specified in 50-2-116, MCA.

COMMENT #46: A Commentor recommended that the wording "food processing" in ARM 16.10.208(6)(b) [37.110.208] be changed to "food manufacturing" for consistency throughout the rules.

RESPONSE: The Department agrees. The change in wording was done accordingly.

COMMENT #47: A Commentor said that the food employee exclusions and restrictions in ARM 16.10.210(1) [37.110.210] seemed overly restrictive in that it may remove employees from working with food who do not pose a danger to providing consumers with a safe product. The Commentor recommended that the 1999 U.S. Food Code language regarding employee exclusion be adopted in ARM 16.10.210(1) [37.110.210].

RESPONSE: The Department disagrees. Montana has more stringent requirements than those contained in the 1999 U.S. Food Code. ARM 16.28.301(2), provides:

- (2) No infectious person may engage in any occupation involving the preparation, serving, or handling of food, including milk, to be consumed by others than his/her immediate family, until a local health officer determines him/her to be free of the infectious agent or unlikely to transmit the infectious agent due to the nature of his/her particular work.

ARM Title 16, chapter 28, subchapter 3 is not open to comment at this time.

COMMENT #48: A Commentor recommended that "and" be substituted for "or" in ARM 16.10.210(5)(a) [37.110.210], as in hand cleaner must be safe for employee skin "and" be safe for food.

RESPONSE: The Department agrees. The wording in ARM 16.10.210(5) [37.110.210] was changed accordingly.

COMMENT #49: A Commentor wanted to make sure that ARM 16.10.210(6) [37.110.210] did not prohibit bare hand contact with food.

RESPONSE: Bare hand contact is not totally prohibited in ARM 16.10.210(6) [37.110.210], but is required to be "minimized".

COMMENT #50: A Commentor wanted clarification as to what extent beard restraints, stated in ARM 16.10.210(7)(f) [37.110.210], should be worn, e.g., would facial hair such as mustaches be exempt, and would it apply to full beards.

RESPONSE: The 1999 U.S. Food Code, of which the requirements of ARM 16.10.210(7)(f) [37.110.210] came from, does not specify the extent of beard restraints. The Department advises that the person in charge of a food establishment make the determination on a case-by-case basis where facial hair may come in contact with food.

COMMENT #51: A Commentor objected to the requirement of beard restraints in ARM 16.10.210(7)(f) [37.110.210] because a restaurant's employees may prepare the food in front of consumers, and consumers may not be comfortable with the appearance of beard restraints.

RESPONSE: The Department elected to add subsection (7)(i), which provides an exemption for hair and beard restraints, and is adopted from paragraph 2-402.11 (B) of the 1999 U.S. Food Code. Subsection (7)(i) exempts food employees such as counter staff, hostesses, and wait staff if they present a minimal risk of contaminating exposed food and food contact surfaces.

COMMENT #52: A Commentor asked if ARM 16.10.213(11) [37.110.213] could contain language about classes of hoods and where, when, and for what type of grease and other emissions they could be used.

RESPONSE: The Department disagrees. The authority for handling these matters is through the building codes divisions of the state and local governments.

COMMENT #53: A Commentor found the language in ARM 16.10.213(15) [37.110.213] to be redundant, and asked that pre-existing equipment that "meets the requirements of this subchapter" is enough language for this provision.

RESPONSE: The Department disagrees. ARM 16.10.213(15) [37.110.213] provides an exemption for equipment not meeting the requirements of the subchapter as long as the equipment "is in good repair, capable of being maintained in a sanitary condition, and the food contact surfaces are non-toxic".

COMMENT #54: A Commentor pointed out that fire marshals do not set the fire prevention sprinkler head requirements, and asked that the language saying so in ARM 16.10.214(1) [37.110.214] be deleted.

RESPONSE: The Department agrees. The suggested change was made to ARM 16.10.214(1) [37.110.214].

COMMENT #55: A Commentor asked that the wording "readily moveable" in ARM 16.10.214(3)(a) and (b) [37.110.214] be changed to "easily moveable" for language consistency throughout the rule and to comply with the definition of "easily moveable" found in ARM 16.10.203(16) [37.110.203].

RESPONSE: The Department agrees. Changes reflecting the suggestion were made in ARM 16.10.214(2), (3) and (4) [37.110.214]. ARM 16.10.214(5) [37.110.214] was eliminated because "easily moveable" is already defined in ARM 16.10.203(16) [37.110.203].

COMMENT #56: A Commentor asked that ARM 16.10.215 [37.110.215] mandate that food establishments have three-compartment sinks regardless of having a mechanical dish washing machine.

RESPONSE: ARM 16.10.215(28) [37.110.215] addresses this issue. Under this provision, the food establishment that has a dishwashing machine must have a manual dish washing facility described in ARM 16.10.215(10) [37.110.215], or a plan acceptable to the regulatory authority. The Department feels that ARM 16.10.215(28) [37.110.215] provides more flexibility for a substitute rather than mandating three-compartment sinks.

COMMENT #57: A Commentor asked that the proper concentration for quaternary ammonium sanitizer used for manual washing and dish machines be stated for ARM 16.10.215(14)(d) [37.110.215].

RESPONSE: The Department agrees. The changes were made regarding quaternary ammonium sanitizer.

COMMENT #58: A Commentor asked that the U.S. Code of Federal Regulation provision for sanitizer strength in ARM 16.10.215(14)(b) [37.110.215] be used, meaning the provision should read "shall not exceed 100 parts-per-million" rather than the stated 200 parts-per-million.

RESPONSE: The Department agrees. The changes were made to ARM 16.10.215(14)(b) [37.110.215].

COMMENT #59: A Commentor recommended that the 1999 U.S. Food Code's language regarding contact time for sanitizers be used for ARM 16.10.215(14)(b) [37.110.215], meaning that the contact time for chlorine sanitizers should be for 10 seconds, and 30 seconds for iodine-based sanitizers.

RESPONSE: The Department agrees. The suggested changes were made.

COMMENT #60: A Commentor recommended that ARM 16.10.215(25) [37.110.215] require the use of minimum-maximum registering thermometers be used, which are currently being used by regulatory and food service personnel throughout the state.

RESPONSE: ARM 16.10.215(25) [37.110.215] does require such devices. An "irreversible registering temperature indicator", as stated in ARM 16.10.215(25) [37.110.215], is the same as a "minimum-maximum registering thermometer".

COMMENT #61: A Commentor pointed out that ARM 16.10.216(5) [37.110.216] incorrectly states that the location of fire prevention sprinkler heads is required by law, when in fact it is required by building codes. The Commentor suggested deleting the language after "fire prevention sprinkler heads".

RESPONSE: The Department agrees. The suggested changes were made.

COMMENT #62: A Commentor asked for a better description on water reservoirs for produce mister systems in ARM 16.10.217(6) [37.110.217]. Some secondary water systems may contain water softeners, reverse osmosis cartridges, activated carbon cartridges, and UV light treatment. The representative asked whether these systems have the "reservoir" that must be cleaned and sanitized in ARM 16.10.217(6) [37.110.217], or did the provision only pertain to pressure tank/well water systems.

RESPONSE: The Department recognizes that there are two kinds of water systems for produce misters in grocery stores: those attached directly to an approved (public) water supply, and those attached to a secondary water source (reservoir). ARM 16.10.217(6) [37.110.217] applies to misters attached to secondary water systems, and not to those attached to the main water supply.

COMMENT #63: A Commentor asked who determines when and where grease traps are required in ARM 16.10.219(4) [37.110.219]. The Commentor also said that several plumbers and city building officials do not know what is meant by a "properly trapped open sink" as stated in ARM 16.10.219(6) [37.110.219] because all sinks are properly trapped open sinks. The Commentor asked that ARM 16.10.219(6) [37.110.219] be clarified.

RESPONSE: Regarding grease traps in ARM 16.10.219(4) [37.110.219], building codes determine when and where they are required. Regarding ARM 16.10.219(6) [37.110.219], the language "except for properly trapped open sinks" was eliminated.

COMMENT #64: Two Commentors asked that the 200 feet requirement in ARM 16.10.220(1) [37.110.220] be clarified to either include or exclude toilet facilities that are outside of the establishment's building but 200 feet away in another building. Clarifying this would enable or not enable semi-permanent establishments to have toilet facilities out of their structures.

RESPONSE: New Rule VII(2) [37.110.253] for semi-permanent food service establishments requires restroom facilities for food employees to be located within 200 feet of the structure and be accessible during all hours of operation. It is agreed, however, that ARM 16.10.220(1) [37.110.220] should be altered to reflect the language in new Rule VII(2) [37.110.253]. The changes were made to ARM 16.10.220(1) [37.110.220] to reflect the acceptance of restrooms outside of the establishment's building.

COMMENT #65: A Commentor asked that continuous towel systems not be allowed in ARM 16.10.221(9) [37.110.221] because a person using such a system usually has to touch the portions of the towel that have been used, which is not sanitary practice.

RESPONSE: The 1999 U.S. Food Code, in section 6.301.12, provides that a "continuous towel system that supplies the user with a clean towel" is permissible for hand washing facilities. ARM 16.10.221(9) [37.110.221] was changed to reflect the food code's language.

COMMENT #66: A Commentor asked that a distance requirement between hand washing sinks and food preparation areas be implemented in ARM 16.10.221 [37.110.221]. The Commentor said having a rule that would require a maximum "feet of walking distance" would help in making hand washing more convenient and enforceable.

RESPONSE: The Department disagrees. ARM 16.10.221(3) [37.110.221] requires hand washing facilities to be "located within the area or areas where food is prepared or served and in utensil washing areas". ARM 16.10.221(3)(a) [37.110.221] requires that the "number and location of hand washing

facilities in the areas will be determined by the convenience of the hand washing facility to the food employee". The wording in ARM 16.10.221(3) and (3)(a) [37.110.221] should remain because "convenience" should be determined on a case-by-case basis with the individual nature of the food establishment.

COMMENT #67: A Commentor asked if a floor drain that is water-flushed exist in a walk-in cooler under ARM 16.10.225(4) [37.110.225]. The Commentor pointed out that there might be a conflict between ARM 16.10.225(4) [37.110.225] and the Uniform Plumbing Code on this point.

RESPONSE: ARM 16.10.225(4) [37.110.225], or any other rule provision, does not require floor drains in walk-in coolers. The Department would defer to state and local building codes officials on this issue.

COMMENT #68: A Commentor asked if there was a difference between a "utility sink" and a "service sink" in ARM 16.10.227 [37.110.227].

RESPONSE: There is no difference in meaning. The word "service sink" was chosen because the 1999 U.S. Food Code uses this term.

COMMENT #69: A Commentor asked that wiping cloths only be allowed to be laundered in warewashing or utility sinks, not in food preparation sinks as stated in ARM 16.10.232(6)(b) [37.110.232].

RESPONSE: The Department agrees. The suggested change was made in ARM 16.10.232(6)(b) [37.110.232].

COMMENT #70: A Commentor asked if ARM 16.10.236(8) and (11) [37.110.236] required the water supply used for washing equipment and hands must comply with ARM 16.10.217(1) and (2) [37.110.217], or if buckets of water were allowed to be used.

RESPONSE: The Department feels it would be onerous to require temporary food service establishments to comply with ARM 16.10.217(1) [37.110.217] (requiring a water source constructed and operated in accordance with the Montana Department of Environmental Quality regulations for public water supplies) and ARM 16.10.217(2) [37.110.217] (requiring water not provided directly by pipe to be transported in bulk in accordance with the Montana Department of Environmental Quality regulations for water haulers). However, ARM 16.10.217(3) [37.110.217] applies to temporary establishments. That rule provides that bottled and packaged potable water be obtained from an approved public water source, be handled in a way that prevents contamination, and be dispensed from the original container. As such, changes were made to ARM 16.10.236(8) [37.110.236] to reflect that ARM 16.10.217(3) [37.110.217] applies. ARM 16.10.236(11) [37.110.236] sets out minimum standards for a food employees' hand washing facility, and the Department does not feel it needs

to be altered.

COMMENT #71: A Commentor asked for ARM 16.10.238 [37.110.238] to contain more enforcement power at the local level to take corrective actions. The Commentor said that currently, it appears that local inspectors are limited to contacting the Department about license revocation or suspension.

RESPONSE: The administrative rules cannot conflict with statutes. Section 50-50-210, MCA, provides that plans of correction must be submitted to the Department, not to the local health authority, and if acceptable to the Department, the corrective action will be a bar to canceling the license. The county sanitarians who served on the food code task force were asked if they wanted more local enforcement authority, and they responded that the statutes and rules provided enough. The Department, however, encourages local health authority involvement in plans of correction.

COMMENT #72: A Commentor asked what the meaning of "bar" meant in ARM 16.10.238(7) [37.110.238], as in a plan of correction is a bar to canceling a license.

RESPONSE: The term "bar", which comes from statutory language in 50-50-210, MCA, means "prevent", as in an acceptable plan of correction submitted to the Department will prevent the Department from suspending or revoking a license.

COMMENT #73: A Commentor asked that ARM 16.10.239 [37.110.239] contain more enforcement power for county officials when food establishments do not take the proscribed corrective actions after inspections.

RESPONSE: See Department response for Comment #71. Besides reporting to the Department the violations for possible license suspension or revocation, local health authorities can use the services of their county attorneys to prosecute violations, with Department involvement, pursuant to 50-50-107, 50-50-108, 50-50-109, and 50-50-110, MCA. These statutory provisions allow county attorneys to prosecute violations, make violations criminal misdemeanors, allow for civil action including injunctive relief, and allow recovery for costs and expenses in enforcement.

COMMENT #74: A Commentor asked whether a system could be developed under ARM 16.10.239 [37.110.239] so that inspections would be uniform across the counties rather than having variances between counties.

RESPONSE: ARM 16.10.243(3)(a) [37.110.243] provides that "[a]t least one sanitarian working with or for the local board of health must receive training from the Department in standardized food service inspection techniques. The Department is responsible for making training and standardization review

available on a periodic basis." This provision helps standardize county inspections. The Department will be scheduling standardization training with local health department inspectors over the next calendar year utilizing Department staff who have already been restandardized by FDA food safety officials.

COMMENT #75: A Commentor had concerns about eliminating the point system of inspections and implementing risk-based inspections in ARM 16.10.239 [37.110.239]. The Commentor felt that the risk-based system may be more time consuming, especially during the system's implementation and training, and that it would be difficult to achieve with the counties' current limited funds provided by current license fees. Also, the Commentor said that many counties have modified inspection programs which calculate the number of inspections required using scores as one of the criteria, and risk-based inspections would require completely re-working the modified programs which would be complicated and time consuming. The Commentor requested that the scoring method be retained until these issues are resolved rather than having the rule implementing risk-based inspections first and then the actual system later.

RESPONSE: The Department disagrees. The risk-based inspection intends to simplify the inspection system from the point system. Points marked from a total of 100 does not necessarily address issues in food service establishments that are vital to preserving public health. At the 2000 Fall Sanitarian Conference, held in early October in Bozeman, the majority of sanitarians said they preferred the non-score system.

These rules are slated to be in effect by January 1, 2001. The Department has considered the burdens on local sanitarians of learning the new inspection system. The Department has considered phasing in the risk-based system after the effective date of the rules, but has considered this option unwise for purposes of the new rules.

The Department is willing to enter into agreements with local health authorities to phase in the systems for those counties. The Department will develop and distribute a revised food service inspection form to local health officials to provide an opportunity for comment on and modification of the form. Local jurisdictions will also have an opportunity to utilize the existing form until the new forms are finalized.

COMMENT #76: A Commentor requested that the inspection forms be printed to read that failure to comply with any time limits for corrections of critical items may result in cessation of food service operations, as stated in ARM 16.10.239(5) [37.110.239].

RESPONSE: ARM 16.10.239(5) [37.110.239] provides that the inspection report "must state that failure to comply with any time limits for corrections of critical item violations may

result in cessation of food service operations". The Department will do so for its new risk-based inspection forms.

COMMENT #77: A Commentor found that the critical items listed in ARM 16.10.239(4)(a)(I) [37.110.239] are different from those critical items listed in the 1999 U.S. Food Code, and requested that the following not be considered critical: ARM 16.10.206(3) [37.110.206]; 16.10.206(6) [37.110.206]; 16.10.207(5) [37.110.207]; 16.10.208(3) [37.110.208]; 16.10.208(6) [37.110.208]; 16.10.210(2) [37.110.210]; 16.10.213(9)(a) [37.110.213]; and 16.10.221(3) [37.110.221].

RESPONSE: The Department consulted with the Commentor prior to the publication of the notice of these rules in August 24, 2000. The Department agreed to remove as critical items ARM 16.10.206(3) [37.110.206]; 16.10.206(6) [37.110.206]; and 16.10.210(2) [37.110.210]. The Department disagreed with removing as critical items ARM 16.10.207(5) [37.110.207]; 16.10.208(3) [37.110.208]; 16.10.208(6) [37.110.208]; 16.10.213(9)(a) [37.110.213]; and 16.10.221(3) [37.110.221]. On the provisions that were not agreed upon, the Department maintains that these provisions are critical items as defined in ARM 16.10.203(11) [37.110.203]: they are provisions that if violated, are "more likely than other violations to contribute to food contamination, illness, or environmental degradation".

COMMENT #78: A Commentor asked that ARM 16.10.241 [37.110.241] contain a requirement for complete physical separation between non-food portions of business and the food portions. The Commentor said such a provision is needed because of the proliferation of beauty parlors serving coffee espresso drinks and tea drinks within their businesses. The Commentor is concerned about the potential cross-contamination issues that may surface in such businesses.

RESPONSE: The Department disagrees. ARM 16.10.231(5) [37.110.231] requires the prevention of cross-contamination of food with toxic materials by having separate storage areas for food and toxic materials and prohibiting storing toxic materials above food and food-contact surfaces except detergents and sanitizers used for utensil cleaning as long as certain requirements are met. ARM 16.10.231(7) [37.110.231] provides that toxic materials may not be used in a way that contaminates food, equipment, or utensils, or in a way that constitutes a hazard to food employees or other persons. The Department and the food code task force feel these provisions in ARM 16.10.231 [37.110.231] are sufficient rather than requiring separate rooms in ARM 16.10.241 [37.110.241]. Local health authorities have the power to implement stricter standards pursuant to 50-2-116(2)(k), MCA.

COMMENT #79: A Commentor asked that ARM 16.10.243(2) [37.110.243] contain more detail regarding modified inspection program agreements between the Department and the local health

authorities rather than relying on policy.

RESPONSE: The Department disagrees. Having the same requirements for modified inspection programs for each county is not feasible given that each county has different numbers of establishments, different kinds of establishments with respect to risk levels, and different county staffing to conduct inspections.

COMMENT #80: A Commentor asked that all food safety inspectors have food safety certification equivalent to ServSafe manager certification. This would help assure that food inspectors demonstrate knowledge in food safety.

RESPONSE: The Department disagrees. All registered sanitarians in Montana are regulated through a professional licensing board through the Montana Department of Commerce. The requirements for registered sanitarians is to have at least a bachelor degree in microbiology or equivalent, pass an examination with at least a 70 percent pass rate, and pay professional license fees. The Department ensures that at least one sanitarian in every county is standardized regarding enforcement of food service rules. That standardization is more extensive than the training received through ServSafe manager certification. As an aside, the majority of Montana's sanitarians inspecting food establishments are certified as ServSafe trainers.

COMMENT #81: A Commentor asked that the rules include a consumer disclosure statement for consumers ordering raw or undercooked food items of animal origin. The Commentor said the disclosure statement would only entail telling the consumer what particular food items contain, e.g., a Caesar salad dressing may contain raw egg, and could be displayed anywhere that a food service operator would like, e.g., on menus, on table tents, or in a separate leaflet given to the consumer after ordering.

RESPONSE: This issue has been considered in the food code task force, of which a majority of the members disagreed with having such a rule. The Department will issue a recommendation to disclose food ingredients of raw or undercooked food of animal origin in its Green Book manual, which is provided to all local health authorities and food service establishments.

COMMENT #82: A Commentor said that the rules need clearer delineation between the roles of the Department and the local health authorities. The Commentor said that as it stands now, there is no consistency throughout the state regarding licensure requirements and violations of food service rules. The Commentor said that having the delineation would eliminate the Department's philosophy that individual counties may interpret the rules as they choose.

RESPONSE: The Department disagrees. The roles of the local health authorities and the Department are delineated in Title

50, chapter 50, MCA, and in ARM 16.10.243 [37.110.243]. Also, local health authorities are allowed to adopt their own rules as long as they are not less stringent than the department's in 50-2-116(2)(k), MCA. See the Department's responses to Comments #2, 45, 71, and 73.

COMMENT #83: A Commentor asked that new license applications consist of a separate category for caterers and delicatessens. The Commentor said that the rules should define these types of establishments and explain what they are allowed to do. The Commentor said that currently, these establishments are listed with an "F1" endorsement on the licenses, meaning they can serve whatever they want, wherever they want.

RESPONSE: Food license endorsements are not covered in these rules. For issues where food establishments expand the scope of their licenses endorsements, ARM 16.10.241(1) [37.110.241] specifies that these changes must be approved through plan review.

/s/ Dawn Sliva  
Rule Reviewer

/s/ Laurie Ekanger  
Director, Public Health and  
Human Services

Certified to the Secretary of State November 13, 2000.

BEFORE THE DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES OF THE  
STATE OF MONTANA

In the matter of the ) NOTICE OF AMENDMENT  
amendment of ARM 16.10.1301, )  
16.10.1308, 16.10.1309, )  
16.10.1506, 16.10.1522, )  
16.10.1524 and 16.10.1525 )  
pertaining to swimming pools, )  
spas and swimming areas )

TO: All Interested Persons

1. On August 24, 2000, the Department of Public Health and Human Services published notice of the proposed amendment of the above-stated rules at page 2178 of the 2000 Montana Administrative Register, issue number 16.

2. The Department has amended ARM 16.10.1301, 16.10.1309, 16.10.1506 and 16.10.1524 as proposed.

3. The Department has amended the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

16.10.1308 SAFETY REQUIREMENTS (1) The following safety provisions are required:

(a) remains as proposed.

(b) Signs or buoys indicating the existence of a dropoff must be installed on the shoreline at the site of closest to the dropoff.

(c) Each public bathing area place must be equipped with lifesaving equipment that consists of not less than either a rescue tube or, in the alternative, one lifesaving ring 15 inches in diameter attached to at least 75 feet of 3/16 1/4 inch manila-line, which must be hung in a conspicuous place on the beach and be kept readily available for use.

(d) through (e)(ii) remain as proposed.

(iii) Each lifeguard must be currently certified: by either the American red cross or the American heart association in methods of cardiopulmonary resuscitation (CPR), first aid, and water safety or its equivalent;

(A) by either the American red cross or the American heart association in methods of cardiopulmonary resuscitation (CPR), first aid, and water safety or its equivalent; and

(B) as having completed lifeguard training by either the American red cross, the young men's christian association, the boy scouts, or ellis and associates, inc. of Kingwood, Texas.

(iv) A copy of each lifeguard's CPR certification required certifications must be kept on the premises of the swimming area and be available for review and verification during inspections;

(v) through (f) remain as proposed.

(g) A sign indicating the area designated for swimming must be posted on the shore adjacent to the designated swimming area and at the entrance to the swimming area.

AUTH: Sec. 50-53-103, MCA

IMP: Sec. 50-53-103 and 50-53-107, MCA

16.10.1522 BACTERIOLOGICAL AND CHEMICAL QUALITY

(1) through (6) remain as proposed.

(7) The water shall have sufficient clarity at all times so that a black disc, 6 inches in diameter, is readily clearly visible and sharply defined when placed on a white field at the deepest point of the swimming pool or spa.

(8) through (10) remain as proposed.

AUTH: Sec. 50-53-103, MCA

IMP: Sec. 50-53-107 and 50-53-115, MCA

16.10.1525 EQUIPMENT AND PERSONNEL (1) remains as proposed.

(2) Every publicly owned public swimming pool must meet the following lifeguard requirements:

(a) and (b) remain as proposed.

(c) ~~Each lifeguard must be currently certified; by either the American red cross or the American heart association in methods of first aid, cardiopulmonary resuscitation (CPR), and water safety or its equivalent;~~

(i) by either the American red cross or the American heart association in methods of cardiopulmonary resuscitation (CPR), first aid, and water safety or its equivalent; and

(ii) as having completed lifeguard training by either the American red cross, the young men's christian association, the boy scouts, or ellis and associates, inc. of Kingwood, Texas.

(d) through (3) remain as proposed.

(4) Every swimming pool must be equipped with one backboard and either a rescue tube or, in the alternative, one or more ring buoys having a maximum of 15 to 16 inches inside diameter with a 1/4 inch manila-line at least equal in length to the maximum width of the swimming pool attached securely to it and kept in good repair. A shepherd's crook or reaching pole must also be provided. In small swimming pools not exceeding 15 feet in width, a ring buoy with a minimum length of 14 feet of manila throwing line attached may be substituted for a shepherd's crook or a reaching pole. Such safety equipment must be accessible for immediate use in the pool area.

(5) and (6) remain as proposed.

AUTH: Sec. 50-53-103, MCA

IMP: Sec. 50-53-107, MCA

4. The department notes that, through an oversight, an intended amendment of ARM 16.10.1308 was omitted, one that would allow a rescue tube to be used as lifesaving equipment as an alternative to a lifesaving ring plus manila-line. The

rationale for the proposed rule amendments did, however, contain an explanation of why the amendment to allow rescue tubes was necessary, thereby indicating the department's intent. In addition, the same proposed amendment was left out of ARM 16.10.1525.

Because the department's intent was clear that it intended to include the omitted proposed amendments referred to above, given their justification in the proposal's rationale, and because the amendments actually give swimming area and pool operators more flexibility in choice of safety equipment, the department has added amendments to both ARM 16.10.1308 and 16.10.1525 to allow the use of rescue tubes.

5. The Department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

COMMENT #1: One comment expressed the opinion that the 3/16 inch manila-line that ARM 16.10.1308(1)(c) requires to be on a ring buoy is not of sufficient strength to reliably pull in a drowning victim.

RESPONSE: The Commentor's opinion is supported by the American National Standards Institute's Standards for Public Swimming Pools, which require, at a minimum, a 1/4 inch diameter throwing rope to be attached to a ring buoy. The American National Standards Institute is recognized as the entity accepted nationally to certify that a process ensuring adequate involvement of all affected parties has been used in development of the standards in question and that substantial agreement on the standards has been reached by the affected parties--in this case, the process used by the Technical Council of the National Spa and Pool Institute. Therefore, the department has made the requested change to ARM 16.10.1308.

COMMENT #2: A Commentor responsible for a municipal pool felt that public safety required that lifeguards, besides being certified in CPR and first aid, should also be trained and certified in pool safety and lifeguarding techniques through lifeguard programs established by either the American Red Cross, the YMCA, the Boy Scouts of America, or Ellis and Associates, Inc., of Kingwood Texas.

RESPONSE: The department agreed and added the requirement to both ARM 16.10.1308 and 16.10.1525.

COMMENT #3: A county health department Commentor requested that the standards of ARM 16.10.1522 concerning clarity be amended to require turbidity monitoring to ensure turbidity is not excessive during and for a while after higher bather load periods.

RESPONSE: The department did not adopt the suggestion for

several reasons. First, a turbidity standard requires the use of expensive measurement equipment, a nephelometer, that neither the state nor many local health departments have. In addition, the American National Standards Institute and National Spa and Pool Institute standards for pools require only that the bottom of the deepest part of the pool and/or the main drain be "clearly visible and sharply defined". Finally, the prime object of a clarity rule is to ensure that pool water is not so murky that it is difficult to spot someone on the bottom of the pool who may be in trouble. A visual check is simple, effectively used by both pool operators and health department staff without the need for training, and inexpensive, as opposed to the use of a nephelometer. However, the language from the national standards quoted above has been added to ARM 16.10.1522(7) in order to make clear that sharply defined, rather than fuzzy, visibility on the bottom of the pool is necessary.

COMMENT #4: A comment from the Department of Fish, Wildlife, and Parks expressed concern about the deletion of the definition of "public bathing place" from ARM 16.10.1301 and suggested the need for clarification about whether a swimming area without a bathhouse or other facility development would be subject to the department's licensure authority.

RESPONSE: The "public bathing place" definition was deleted from ARM 16.10.1301 because the swimming area licensure statutes (in 50-53-102, MCA) define that phrase and the rule's definition conflicts with the statutory one in some respects. The statutory definition of "public bathing place" is "a body of water with bathhouses and related appurtenances operated for the public". Therefore, if a swimming area other than an artificial pool does not have "bathhouses and related appurtenances", it will not be subject to the department's licensure authority and standards.

COMMENT #5: The Department of Fish, Wildlife, and Parks also requested that "designated swim area" be defined in order to avoid varying interpretations across the state.

RESPONSE: The department agreed that the lack of a definition might lead to varying interpretations. Therefore, ARM 16.10.1308 has been amended to require those responsible for public swimming areas to indicate with a sign or signs on the shore and at the entrance to the swimming area what area is designated for swimming.

COMMENT #6: The Department of Fish, Wildlife, and Parks also pointed out that the requirement in ARM 16.10.1308(1)(b) that a sign be posted at the site of a dropoff could create an attractive and dangerous nuisance where swimmers hang onto the sign or buoy, also thereby obscuring or moving the sign or buoy and increasing maintenance costs. In addition, more than one dropoff may exist in a single swim area. As an alternative, the

commenter suggested using signs with messages equivalent to "swim at your own risk".

RESPONSE: The department agreed with the concerns expressed above and will instead require that the dropoff notification sign be located on the shoreline at a spot closest to the dropoff in question.

COMMENT #7: A Commentor asked for clarification of the difference among the terms "public bathing area", "designated swim area", and "public bathing place".

RESPONSE: The phrase "public bathing area" is meant to mean the same as "public bathing place", the phrase used in the statutes. To avoid confusion about its meaning, "public bathing area" in ARM 16.10.1308 is amended to read "public bathing place". A "designated swim area" is simply the area of the water designated for swimming, whereas a "public bathing place", by statutory definition, includes bathhouses and other facilities related to the bathing area.

COMMENT #8: The Department of Fish, Wildlife, and Parks expressed support and approval for deletion of the lifeguard requirements except when the area has a diving area and equipment.

RESPONSE: The department appreciates the support.

/s/ Dawn Sliva  
Rule Reviewer

/s/ Laurie Ekanger  
Director, Public Health and  
Human Services

Certified to the Secretary of State November 13, 2000.

BEFORE THE DEPARTMENT  
OF PUBLIC SERVICE REGULATION  
OF THE STATE OF MONTANA

In the Matter of the Petition of )  
Flathead Electric Cooperative, Inc.) DECLARATORY RULING  
and Energy Northwest, Inc. for )  
Declaratory Ruling on Agreement )  
under §§ 69-5-108 and -112, MCA. )

On April 4, 2000, Flathead Electric Cooperative, Inc., (Flathead) and its affiliate Energy Northwest, Inc., (ENI) filed an Assignment Agreement and requested the approval from the Montana Public Service Commission (Commission) of the Agreement pursuant to §§ 69-5-108 and 69-5-112, Montana Code Annotated (MCA). ENI is a utility regulated by the Commission under Title 69, Chapter 3, MCA and providing electric service in Kalispell, Whitefish, and Columbia Falls. Under the terms of the Agreement, ENI would transfer its distribution system assets, operating responsibilities and electric utility customers to its parent, Flathead, a rural electric cooperative organized under Title 35, Chapter 18, MCA. The Agreement recited that due to the differing corporate structures, Flathead and ENI differed in their ability to secure wholesale energy supply contracts on favorable terms. Flathead and ENI wanted to assign ENI's service territory and assets to Flathead to eliminate inefficiencies and to secure power supply agreements on terms most favorable to all the customers.

On May 26, 2000, Flathead and ENI filed an Amended Application incorporating a Petition for Declaratory Ruling, maintaining that § 69-5-112, MCA, "gives the Commission jurisdiction to review and approve agreements between electric facilities providers ... to transfer facilities and consumers between the providers." Petitioners maintained that the Commission has the jurisdiction to review and approve the transfer in the Application. Incorporating the allegations from the original Application, the Petition alleged the following for the Commission's consideration:

- a. Joint petitioners Flathead and ENI share the same address: 2510 Highway 2 East, Kalispell, Montana 59901.
- b. ENI does not qualify for preference power from the Bonneville Power Administration (BPA), while Flathead does qualify, and integrating the respective service territories would allow ENI's customers the benefits of the more economical preference power.
- c. In accordance with § 69-5-112(2), MCA, all consumers affected by the proposed transfer were contacted and informed of the proposed transfer on their rates and 2,597 of the 2,626

consumers who responded favored the transfer and 29 were opposed.

- d. The service territories are contiguous and highly irregular with some facilities that cannot be physically separated.

Issue Presented for Declaratory Ruling

Does Title 69, Chapter 5, Montana Code Annotated (MCA), authorize the Commission to approve the agreement between a rural electric cooperative and its Commission-regulated subsidiary to transfer distribution system assets and utility customers, by merging their service territories such that the cooperative will become the sole "electric facilities provider"?

History: Flathead/ENI's Acquisition of PacifiCorp's Service Territory

In September 1998, PacifiCorp, doing business as Pacific Power and Light, announced that it was offering its distribution facilities in northwest Montana for sale through a bid process. PacifiCorp maintained that the Commission had no jurisdiction over the sale. Within weeks, PacifiCorp announced that Flathead Electric Cooperative, Inc., was the successful bidder. The Commission asserted jurisdiction over PacifiCorp's sale of its distribution system. Together, the Commission and Montana Consumer Counsel (MCC) applied to district court for an injunction to prevent PacifiCorp from leaving Montana with the proceeds of the sale, without the Commission's oversight of the sale. (Cause No. DV-98-437(B), Eleventh Judicial District, Flathead County.)

Flathead, the successful bidder, was granted intervention in the proceedings to represent the interests of its members. In an affidavit supporting the Motion to Intervene, Warren McConkey, general manager of Flathead, averred that Flathead and its subsidiary, ENI, had entered into an agreement with PacifiCorp for the purchase of PacifiCorp's electric distribution system in Montana. Flathead would acquire PacifiCorp's assets in the unincorporated areas of its service territory and ENI would acquire the assets in three incorporated areas, each with population in excess of 3,500. ENI would be a regulated utility subject to the Commission's jurisdiction.

The Commission, MCC, PacifiCorp and Flathead executed a Settlement Agreement in Cause No. DV-98-437(B) on October 8, 1998, providing that PacifiCorp would share the net gain of its distribution system sale on a 50/50 basis with its former Montana retail customers. The Parties requested a stay of the injunction proceeding until November 2, 1998, and agreed to dismiss the civil proceeding if the Commission issued a final approval of the Settlement Agreement.

As agreed, the Commission initiated Docket No. D98.10.218 to investigate the sale and transfer of PacifiCorp's distribution system and subsequently issued Order No. 6103a, Order Approving Proposed Sale of PacifiCorp's Electric Distribution System to Flathead Electric Cooperative, Inc., on November 2, 1998. The District Court dismissed the injunction proceeding, and Flathead and ENI acquired the distribution facilities and public utility obligations of PacifiCorp.

The parties in Docket No. D98.10.218 agreed on \$4 million as the amount of the net gain to be distributed to PacifiCorp's former ratepayers, but disagreed as to how it should be distributed. In the Order on Reconsideration issued December 16, 1998, Order No. 6103b, the Commission established a contested case proceeding to determine the allocation of the \$4 million net gain.

The Commission issued Procedural Order No. 6103c on January 5, 1999, and conducted a public hearing in Kalispell on May 12, 1999 on a Stipulation that the \$4 million of above-book proceeds should be applied to system improvements most needed anywhere in the acquired service territory. In Order No. 6103d, Final Order Approving Recommended Allocation of Net Gain, issued on June 8, 1999, the Commission determined that applying the \$4 million net gain throughout the system to address serious reliability concerns would benefit Flathead's and ENI's customers.

#### Petitioners' Comments for Declaratory Ruling

The Commission requested comments on the Petition, which Petitioner filed on September 1, 2000, along with the Affidavit of Warren G. McConkey, general manager of both Flathead and ENI. Mr. McConkey stated that Flathead is a rural electric cooperative organized under the Montana Rural Electric and Telephone Cooperative Act (Title 35, Chapter 18, MCA). Flathead provides electric energy and related services to 37,600 meters in Flathead, Lincoln, Carbon and Park counties, Montana. ENI is incorporated under Montana law and serves 13,300 meters in the incorporated cities of Kalispell, Whitefish and Columbia Falls, Montana. The Internal Revenue Service has acknowledged both Flathead's and ENI's not-for-profit membership status.

Mr. McConkey stated that the boards of both Flathead and ENI in March 2000 agreed to enter into an agreement for ENI to assign its service territory and distribution facilities and assets to Flathead. The purpose was "to avoid unnecessary and inefficient duplication of facilities and to secure a more favorable power supply arrangement for ENI's customers," who would become members of Flathead. He averred that since acquiring PacifiCorp's former service territory, Flathead and ENI have accomplished much, in attempting to lower costs to members and customers, by operating under consolidated manage-

ment. There is an administrative burden, according to Mr. McConkey, in operating the two utilities, since the ownership of the facilities in the Flathead Valley is divided between them. Because the two service territories are intertwined and/or overlapping, he maintained that consolidating ownership of the two utilities would increase efficiencies and eliminate uneconomic duplication of service. His primary concern was that ENI is not eligible to buy preference power from Bonneville Power Administration (BPA) and, as a result, ENI's cost of power is higher.

Petitioners Flathead and ENI in the comments maintained that they will be "substantially and materially affected" if the Commission does not approve the assignment of ENI's service territory and distribution facilities to Flathead. Further, they maintained that it would result in ENI's "being potentially unable to access relatively low cost power" from the Bonneville Power Administration (BPA). In addition, petitioners would have to proceed with the inefficiencies and cost of "operating two utilities with separate regulatory and administrative requirements." They alleged that cost savings to ENI's customers could be delayed or lost and transition to choice might be delayed.

#### Other Comments on Petition for Declaratory Ruling

Montana Cable Telecommunications Association (MCTA). MCTA filed comments opposing Petitioners' request for declaratory relief. MCTA cited concerns about taxation consequences and the lack of regulatory oversight over cooperatives, not related to the central issue of the Commission's authority and/or the desirability of approving this particular agreement. MCTA presented relevant legislative history on territorial integrity, citing testimony of Tim Gregori, the General Manager of Big Horn County Electric Cooperative in 1997. Mr. Gregori testified that the amendment to the Territorial Integrity Act under Senate Bill 390, was intended to eliminate duplicate construction and provide a reasonable method to assign service of customers occupying the border between a "rural area" and an urban area. MCTA stated that Mr. Gregori did not mention, nor did Senate Bill 390 intend to provide, a means for creating a loophole to allow a cooperative to buy and then merge a regulated utility into the rural electric cooperative.

Relevant to this Petition, MCTA stated:

[Title 69, Chapter 5, MCA] under which this amended petition is filed deals solely with territorial integrity, and solely with the details of attempting to find a practical and feasible way to determine who should be served by a for-profit provider versus cooperative in the small alley or border between

their respective service areas. Nothing in [Title 69, Chapter 5, MCA] remotely suggests that it would be ... appropriate ... for merging providers, much less when it is totally contrary to other sections of the law and the legislative intent.

MCTA's Comments, p. 8, filed August 1, 2000.

MCTA requested that the Commission find that there is "no way under present law for such a proposed merger to take place." MCTA suggested that the appropriate forum is the legislature to address the concerns about Petitioners qualifying for the lowest power rate from BPA. Meanwhile, MCTA also proposed that the legislature should address the need for oversight and public review of cooperatives. Id., p. 9.

Montana Electric Cooperatives' Association (MECA). MECA, an association representing 25 electric cooperatives in Montana serving nearly 400,000 members, submitted comments supporting the Petitioners' request for approval of the agreement. MECA believed that the Territorial Integrity Act amendments did not contemplate restrictions on the extent to which territorial service agreements between utilities would be permitted. MECA cited agreements approved by the Commission, particularly the agreement on the assignment of service territory between Vigilante Electric Cooperative and Montana Power Company. Further, the 1997 law did not contemplate 3,500 population restrictions, according to MECA. For an example, in the Billings area, Yellowstone Electric Cooperative has reached territorial service agreements without regard to population constraints. As stated by MECA before the 1997 legislature, the 1997 amendments were intended to lift restrictions on cooperative service in annexed areas.

#### Applicable Law

Title 69, Chapter 5, MCA, was originally passed in 1971 as the "Territorial Integrity Act of 1971." In Senate Bill 390 (1997), the legislature amended the Act, repealing § 69-5-103, MCA, which provided rights and restrictions with respect to service outside the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 3,500 persons on or after March 17, 1939; and every incorporated municipality in which 95% or more of the premises were served by an electric cooperative on February 1, 1971. Section 69-5-104, MCA, (1997) now states that an electric service facilities provider (formerly "electric supplier") has the right to serve the premises it served on May 2, 1997, changing the date from February 1, 1971. The "Rural Electric and Telephone Cooperative Act," Title 35, Chapter 18, MCA (1999), however, retains the threshold requirement of 3,500 population on March 17, 1939 as defining "rural areas" for purposes of service by rural

electric cooperatives.

The Petition for a Declaratory Ruling cites §§ 69-5-108 and 69-5-112, MCA, on the Commission's authority to approve the agreement between Flathead Electric and ENI. In § 69-5-108, MCA (1997) ("Agreements between electric facilities providers"), utilities may enter into agreements identifying "the geographical area to be exclusively served by each electric facilities provider that is party to the agreement, overriding the provisions of 69-5-105 and 69-5-107."

Section 69-5-112, MCA (1997) ("Commission jurisdiction over agreements"), is a new provision under Senate Bill 390 (1997) granting the Commission jurisdiction over agreements of electric facilities providers, providing discretion in the Commission to approve or disapprove agreements, and setting forth the required content of the agreements.

69-5-112. Commission jurisdiction over agreements.

(1) All agreements between electric facilities providers must be submitted to the commission for approval. Each agreement must clearly identify the geographical area to be served by each electric facilities provider.

(2) Whenever an agreement involves the exchange or transfer of customers within service territories, the following must also be included with the agreement submission:

(a) the number and class of customers to be transferred;

(b) assurance that the affected customers have been contacted and have received a written explanation of the difference in rates; and

(c) information with respect to the degree of acceptance by affected customers, such as the number in favor of and those opposed to the transfer.

(3) In approving agreements, the commission shall consider but is not limited to consideration of:

(a) the reasonable likelihood that the agreement, in and of itself, will not cause a decrease in the reliability of electric service to the existing or future ratepayers of any electric facilities provider of the agreement; and

(b) the reasonable likelihood that the agreement will eliminate existing or potentially uneconomic duplication of electric service facilities.

(4) An agreement approved by the commission is valid and enforceable, and except as provided in 69-5-106, an electric facilities provider may not offer, construct or extend electric service facilities into an exclusive territory.

## Discussion

Petitioners argued that the Commission has jurisdiction under the Territorial Integrity Act to approve agreements between electric facilities providers, because all agreements must be submitted to the Commission for approval under § 69-5-112(1), MCA. This argument is circuitous. Of course, the law mandates that electric facilities providers must submit appropriate agreements that qualify under § 69-5-108, MCA, to the Commission for approval. The Commission does not deny that it has the authority to exercise discretion to approve agreements under this chapter and that these providers must submit the agreements to the Commission.

The proper focus is on whether the Petitioners' Agreement meets the intent of the Act, as amended by the 1997 legislature. Petitioners argued that the Act must be interpreted as a whole, giving meaning to and reconciling all statutory terms and provisions to make the Act as a whole effective and operative. "Absurd results are to be avoided" by reasonable construction of the statutes. (Petitioners' Joint Comments, pp. 6-8.)

Whether the Commission can approve this particular agreement depends on whether the Act governs transfers of utility assets, along with the identification of service territories that each will serve and the transfers of customers. Under § 69-5-108, MCA, utilities may enter into agreements that identify the geographical area to be exclusively served by each provider that is party to the agreement. Such agreements may override § 69-5-105, MCA, which provides that the electric facilities provider nearest the premises of a new customer (after May 2, 1997) shall provide service, unless another provider can rebut on the cost issue and provide the service at less cost. Section 69-5-108, MCA, does not provide for agreements to transfer distribution systems, specifically referred to in the Act as "electric service facilities" in the definitions at § 69-5-102(4), MCA. Likewise, § 69-5-112(2), MCA, addresses only transfers of customers and not transfers of electric service facilities.

The basic premise of the Act is to provide for agreements on areas of service, not to provide a means to transfer electric service facilities. Under § 69-5-102(1), MCA, an "agreement" is a written agreement between two or more electric facilities providers that identifies the geographical area to be "served exclusively by each electric facilities provider that is a party to the agreement." An "electric facilities provider" is any utility that provides electric service facilities to the public (§ 69-5-102(3), MCA). The Agreement as proposed would provide that ENI would cease to be an electric facilities provider, have no assets or customers, and have no geographical area to serve, which was not intended

by the Act.

The intention of the Act is to permit utilities to agree to identify an altered geographical area to be served by each provider, subject to the Commission's approval. The Agreement of the Petitioners does not satisfy the legislative intent under the Act to provide a means by which electric facilities providers may alter the boundaries of their service territories, overriding the provisions under the Act.

Petitioners urged the Commission to read the Act as a whole, giving effect to all the provisions. However, Petitioners focused on § 69-5-112(3), MCA, which sets forth what the Commission should consider in determining whether to approve an agreement, while they ignored the basic premise in § 69-5-112(1), MCA, that each agreement must clearly identify the geographical area to be served by each provider. The Commission could not logically and legally designate ENI as having a geographical area or service territory without any customers, because customers would be transferred to the affiliated rural electric provider.

In ignoring the threshold requirement that the Act provides for adjusting boundaries for electric facilities providers, Petitioners asked the Commission to approve an agreement on the speculation that there might be some savings if the BPA allows the ENI customers to benefit from cheaper preference power. Petitioners also asked the Commission to determine that the agreement will not cause decreased reliability of service and that it will eliminate uneconomic duplication of facilities. Absent Petitioners' meeting the threshold requirement in § 69-5-112(1), MCA, to demonstrate altered boundaries for service territories that each will serve, the Commission cannot hurdle this requirement to address factors set forth in § 69-5-112(3), MCA.

Flathead incorporated ENI as a public utility with the secretary of state in order to acquire the distribution facilities and service territory in PacifiCorp's urban areas. The requirements for incorporation of rural electric cooperatives under Title 35, Chapter 18, MCA (population threshold of 3,500) prevented Flathead from providing service in urban areas. Despite this barrier, Flathead maintained that there would be synergies in operating the systems of both the rural electric cooperative and the former PacifiCorp territory as Flathead and ENI. Operating with the same personnel and shared boards of directors, Petitioners were able to realize operating efficiencies and eliminate duplication.

Given the history, it is incongruous to propose that ENI can now assign its entire service territory to Flathead and dissolve ENI, which would no longer have any exclusive area to serve, on the Commission's approval of an agreement under the

Territorial Integrity Act. Flathead/ENI acquired PacifiCorp's utility assets in 1998, after the 1997 amendments to the Act. ENI was formed as the regulated utility to comply with Title 69, Chapter 3, MCA (regulation of public utilities). If rural electric cooperatives had the power to acquire utility assets and customers of a public utility and provide service in the urban areas, Flathead could have acquired PacifiCorp's assets in 1998 without forming the subsidiary. The Commission cannot make legal now what was not legal in 1998, by approving an agreement under the Act to transfer the utility assets, service territory and customers.

Because BPA has denied preference status to ENI, Petitioners now believe they have a burden in operating both a regulated utility under Title 69, Chapter 3, MCA, and a rural electric cooperative under Title 35, Chapter 18, MCA. In requesting approval of an agreement to transfer and assign all the regulated utility's service territory and operating responsibilities to the rural electric cooperative, Petitioners attempted to overcome this burden, pulling out portions of the Act, while disregarding the basic requirements of the Act.

The reality is that there would be no service territory for ENI to serve, in contravention of the Act. The fiction of this transaction is demonstrated by the fact that there would be no consideration for the transfer and acquisition of the service territory and assets of ENI, which is incorporated under Montana law. Petitioners incorrectly proposed that with the Commission's approval of a simple agreement, all the duties of ENI could dissolve, the assets could be absorbed, and Flathead and ENI could become a unified rural electric cooperative.

Pursuant to authority over public utilities under Title 69, Chapter 3, MCA, the Commission asserts jurisdiction over transfers of a utility's assets and operating responsibilities. The Commission would require more than submission of an agreement to approve a transfer of the assets of one complete utility to another. However, the Commission has no authority to approve a transfer that is not legal under other provisions of the law.

The Commission has those powers, express or implied, granted by the Legislature, and may not act in direct contravention of the law. There is no way to reconcile the action requested in the Petition for Declaratory Relief with the Commission's interpretation of the statutes. The Petitioners have made good faith arguments about the benefits of the rural electric cooperative as the sole electric facilities provider, particularly access to Bonneville Power Administration preference power. The Commission cannot reach these arguments under the requirements of the law.

DECLARATORY RULING

The Commission denies the relief requested in the Petition for Declaratory Ruling to approve the agreement between Flathead Electric Cooperative, Inc. and Energy Northwest, Inc. to transfer the customers and distribution assets of ENI to Flathead. The Commission determines that while it has the authority to approve agreements between electric facilities providers to establish exclusive service territories under Title 69, Chapter 5, MCA, the Act was not intended to merge assets, territories and operating responsibilities of utilities, as requested by Petitioners. In particular, the Act was not intended to allow a regulated public utility under Title 69, Chapter 3, MCA, to transfer its assets and operating responsibilities to a rural electric cooperative formed under Title 35, Chapter 18, MCA.

/s/ Dave Fisher

Dave Fisher, Chairman

/s/ Robin A. McHugh

Reviewed by Robin A. McHugh

CERTIFIED TO THE SECRETARY OF STATE NOVEMBER 13, 2000.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE  
Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Business and Labor Interim Committee:

- ▶ Department of Agriculture;
- ▶ Department of Commerce;
- ▶ Department of Labor and Industry;
- ▶ Department of Livestock;
- ▶ Department of Public Service Regulation; and
- ▶ Office of the State Auditor and Insurance Commissioner.

Education Interim Committee:

- ▶ State Board of Education;
- ▶ Board of Public Education;
- ▶ Board of Regents of Higher Education; and
- ▶ Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- ▶ Department of Public Health and Human Services.

Law, Justice, and Indian Affairs Interim Committee:

- ▶ Department of Corrections; and
- ▶ Department of Justice.

Revenue and Taxation Interim Committee:

- ▶ Department of Revenue; and
- ▶ Department of Transportation.

State Administration, Public Retirement Systems, and Veterans' Affairs Interim Committee:

- ▶ Department of Administration;
- ▶ Department of Military Affairs; and
- ▶ Office of the Secretary of State.

Environmental Quality Council:

- ▶ Department of Environmental Quality;
- ▶ Department of Fish, Wildlife, and Parks; and
- ▶ Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is PO Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE  
MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

- |                                     |   |
|-------------------------------------|---|
| Known<br>Subject<br>Matter          | 1. Consult ARM topical index.<br>Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute<br>Number and<br>Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.   |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2000. This table includes those rules adopted during the period October 1, 2000 through December 31, 2000 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2000, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1999 and 2000 Montana Administrative Registers.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number. These will fall alphabetically after department rulemaking actions.

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2.5.502 State Procurement, p. 2092, 2962  
2.21.227 Annual Vacation Leave Policy, p. 903, 1628  
2.21.1301 and other rules - Nondiscrimination - Equal Opportunity - Sexual Harassment Prevention Policy - Equal Employment Opportunity Policy, p. 2732

AGRICULTURE, Department of, Title 4

I & II Japanese Beetle (Popillia japonica) Quarantine, p. 905, 1306  
4.3.202 and other rules - Loan Qualifications, p. 2774  
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4.12.219 and other rules - Commercial Feed, p. 2762  
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(Alfalfa Seed Committee)

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## BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the *Montana Administrative Register* a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in October 2000, appear. Vacancies scheduled to appear from December 1, 2000, through February 28, 2001, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

### IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of November 3, 2000.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM OCTOBER, 2000

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Aging Advisory Council (Public Health and Human Services) Mr. Bud Clinch Libby Qualifications (if required): public member	Governor	Hammer	10/18/2000 7/18/2001
Ms. Roberta Feller Stockett Qualifications (if required): public member	Governor	Upshaw	10/18/2000 7/18/2003
Alternative Health Care Board (Governor) Dr. Margaret Beeson Billings Qualifications (if required): naturopath	Governor	Bergkamp	10/10/2000 9/1/2004
Board of Outfitters (Commerce) Mr. Richard Pasquale Cascade Qualifications (if required): fishing outfitter	Governor	Cunningham	10/1/2000 10/1/2003
Mr. Raymond Rugg Superior Qualifications (if required): hunting and fishing outfitter	Governor	reappointed	10/1/2000 10/1/2003
Board of Real Estate Appraisers (Commerce) Ms. Jennifer Seitz Billings Qualifications (if required): public member	Governor	Cole	10/17/2000 5/1/2001
Burial Preservation Board (Governor) Ms. Sherri Deaver Billings Qualifications (if required): representative of the Archeological Society	Governor	Deaver	10/10/2000 8/22/2002

BOARD AND COUNCIL APPOINTEES FROM OCTOBER, 2000

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Burial Preservation Board (Governor) cont. Mr. Mickey Nelson Helena	Governor	reappointed	10/10/2000 8/22/2002
Qualifications (if required):	representative of the Montana Coroner's Association		
Mr. George Reed, Sr. Crow Agency	Governor	Pretty On Top	10/10/2000 8/22/2002
Qualifications (if required):	representative of the Crow Tribe		
Mr. Ben Speak Thunder Harlem	Governor	Horn	10/10/2000 8/22/2002
Qualifications (if required):	representative of the Fort Belknap Tribe		
Mr. Duncan Standing Rock, Sr. Box Elder	Governor	reappointed	10/10/2000 8/22/2002
Qualifications (if required):	representative of the Chippewa-Cree Tribe		
Mrs. Germaine White St. Ignatius	Governor	reappointed	10/10/2000 8/22/2002
Qualifications (if required):	representative of the Little Shell Tribe		
Microbusiness Advisory Council (Commerce) Mr. Dan Manning Somers	Governor	Schroeppel	10/27/2000 6/30/2003
Qualifications (if required):	representative for Congressional District 1		
Montana Historical Records Advisory Council (Historical Society) Ms. Jodi L. Allison-Bunnell Missoula	Governor	not listed	10/18/2000 10/18/2002
Qualifications (if required):	public member		

BOARD AND COUNCIL APPOINTEES FROM OCTOBER, 2000

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Montana Historical Records Advisory Council (Historical Society) cont.			
Ms. Ellen Crain Butte	Governor	not listed	10/18/2000 10/18/2002
Qualifications (if required): public member			
Ms. Judy Ellinghausen Great Falls	Governor	not listed	10/18/2000 10/18/2002
Qualifications (if required): public member			
Ms. Lory Morrow Helena	Governor	not listed	10/18/2000 10/18/2002
Qualifications (if required): public member			
Ms. Kathy Mosdal O'Brien Billings	Governor	not listed	10/18/2000 10/18/2002
Qualifications (if required): public member			
Ms. Kathryn Otto Helena	Governor	not listed	10/18/2000 10/18/2002
Qualifications (if required): State Archivist			
Ms. Lenore Red Elk Poplar	Governor	not listed	10/18/2000 10/18/2002
Qualifications (if required): public member			
Mr. Kim Allen Scott Bozeman	Governor	not listed	10/18/2000 10/18/2002
Qualifications (if required): public member			

BOARD AND COUNCIL APPOINTEES FROM OCTOBER, 2000

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Montana State Historic Preservation Review Board (Historical Society)			
Mr. Steve Aaberg Lewistown	Governor	reappointed	10/27/2000 10/1/2004
Qualifications (if required): archeologist			
Mr. Rafael Chacon Lolo	Governor	Michels	10/27/2000 10/1/2004
Qualifications (if required): architectural historian			
Mr. Paul Filicetti Missoula	Governor	Deppmeier	10/27/2000 10/1/2004
Qualifications (if required): historical architect			
Ms. J. Rebecca Kallevig Sidney	Governor	Weisgerber	10/27/2000 10/1/2001
Qualifications (if required): public member			
Noxious Weed Seed Free Forage Advisory Council (Agriculture)			
Mr. Dennis Cash Bozeman	Director	not listed	10/11/2000 10/11/2002
Qualifications (if required): ex officio			
Mr. Ray Ditterline Bozeman	Director	not listed	10/11/2000 10/11/2002
Qualifications (if required): ex officio			
Ms. Marcy Mack Pablo	Director	not listed	10/11/2000 10/11/2002
Qualifications (if required): weed districts			

BOARD AND COUNCIL APPOINTEES FROM OCTOBER, 2000

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Noxious Weed Seed Free Forage Mr. Wayne Maughn Fort Benton Qualifications (if required):	Advisory Council (Agriculture) cont. Director livestock/agriculture	not listed	10/11/2000 10/11/2002
Mr. Bob McNeill Dillon Qualifications (if required):	Director outfitters and guides	not listed	10/11/2000 10/11/2002
Mr. W. Ralph Peck Helena Qualifications (if required):	Director Director of Department of Agriculture	not listed	10/11/2000 10/11/2002
Mr. Dennis Perry Choteau Qualifications (if required):	Director feed pellets/cubes products	not listed	10/11/2000 10/11/2002
Mr. LaMonte Schnur Townsend Qualifications (if required):	Director forage producer	not listed	10/11/2000 10/11/2002
Mr. Don Walker Glendive Qualifications (if required):	Director forage producer	not listed	10/11/2000 10/11/2002
Mr. Clay Williams Livingston Qualifications (if required):	Director weed districts	not listed	10/11/2000 10/11/2002

BOARD AND COUNCIL APPOINTEES FROM OCTOBER, 2000

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Noxious Weed Seed Free Forage Advisory Council (Agriculture) cont. Mr. Harry Woll Kalispell Qualifications (if required): forage producer	Director	not listed	10/11/2000 10/11/2002
Organ Donor Awareness Task Force (Public Health and Human Services) Ms. Jennifer Keck Conrad Qualifications (if required): recipient	Governor	not listed	10/18/2000 3/23/2002
State Emergency Response Commission (Military Affairs) Ms. Lorrie Leighton-Boster Helena Qualifications (if required): representative of Department of Public Health and Human Services	Governor	Dawson	10/5/2000 10/1/2003
State-Tribal Economic Development Commission (Governor) Ms. Yvonne Iron Crow Agency Qualifications (if required): representative of the Crow Tribe	Governor	Pretty On Top	10/10/2000 6/30/2001
Mr. Lloyd Irvine Pablo Qualifications (if required): representative of the Confederated Salish and Kootenai Tribe	Governor	Hamel	10/10/2000 6/30/2001
Water and Wastewater Operators' Advisory Council (Environmental Quality) Mr. Lee Leivo Bigfork Qualifications (if required): water treatment plant operator	Governor	reappointed	10/16/2000 10/16/2006

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Alfalfa Seed Committee (Agriculture) Mr. Thomas Matchett, Billings Qualifications (if required): alfalfa seed grower	Governor	12/21/2000
Mr. Gayle Patrick, Malta Qualifications (if required): alfalfa seed grower and seller	Governor	12/21/2000
Alternative Livestock Advisory Council (Fish, Wildlife and Parks) Mr. Stanley F. Meyer, Great Falls Qualifications (if required): representative of the Fish, Wildlife and Parks Commission	Governor	1/1/2001
Mr. Jeremy Kinross-Wright, Big Timber Qualifications (if required): representative of the Board of Livestock	Governor	1/1/2001
Appellate Defender Commission (Administration) Ms. Beverly Kolar, Geyser Qualifications (if required): public member	Governor	1/1/2001
Board of Aeronautics (Transportation) Mr. Douglas Freeman, Hardin Qualifications (if required): member of the Montana League of Cities and Towns and an attorney	Governor	1/1/2001
Mr. Byron Bayers, Twin Bridges Qualifications (if required): member of the Montana Chamber of Commerce	Governor	1/1/2001
Mr. Fred Booth, Fort Benton Qualifications (if required): member of the Montana Pilots' Association	Governor	1/1/2001
Mr. Ronald S. Mercer, Helena Qualifications (if required): representative of the Montana Airport Management Association	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Aeronautics (Transportation) cont. Mr. William Metz, Laurel Qualifications (if required): member of the Montana Aerial Applicators	Governor	1/1/2001
Board of Chiropractors (Commerce) Dr. Gregory Hoell, Bozeman Qualifications (if required): licensed and practicing chiropractor	Governor	1/1/2001
Board of Crime Control (Justice) Mr. Don Bjertness, Billings Qualifications (if required): public member	Governor	1/1/2001
Mr. John Flynn, Townsend Qualifications (if required): county attorney	Governor	1/1/2001
Attorney General Joseph P. Mazurek, Helena Qualifications (if required): Montana's Attorney General	Governor	1/1/2001
Ms. Janet Stevens, Missoula Qualifications (if required): public member	Governor	1/1/2001
Chief Justice Jean A. Turnage, Helena Qualifications (if required): Chief Justice of the Supreme Court	Governor	1/1/2001
Mr. Rick Day, Helena Qualifications (if required): Director of the Department of Corrections	Governor	1/1/2001
Judge Dorothy B. McCarter, Helena Qualifications (if required): judge	Governor	1/1/2001
Ms. Elaine Allestad, Big Timber Qualifications (if required): county commissioner	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Crime Control (Justice) cont. Chief Robert Jones, Great Falls Qualifications (if required): representing police chiefs	Governor	1/1/2001
Sheriff Bill Slaughter, Bozeman Qualifications (if required): sheriff	Governor	1/1/2001
Mr. Ken Stuker, Helena Qualifications (if required): educator	Governor	1/1/2001
Board of Environmental Review (Environmental Quality) Mr. Joe Gerbase, Billings Qualifications (if required): local government planner	Governor	12/31/2000
Mr. Roger Perkins, Laurel Qualifications (if required): hydrologist	Governor	12/31/2000
Mr. Russell Hudson, Libby Qualifications (if required): public member	Governor	12/31/2000
Dr. Garon Smith, Missoula Qualifications (if required): scientist	Governor	12/31/2000
Board of Horse Racing (Commerce) Ms. Lou Wojciechowski, Billings Qualifications (if required): representing District 2	Governor	1/20/2001
Mr. Joe Erickson, Cascade Qualifications (if required): representing the horseracing industry	Governor	1/20/2001
Mr. Bill Brown, Butte Qualifications (if required): representing the horseracing industry	Governor	1/20/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Horse Racing (Commerce) cont. Ms. Susan Austin, Kalispell Qualifications (if required): representing District 5	Governor	1/20/2001
Board of Housing (Commerce) Mr. William H. Oser, Billings Qualifications (if required): public member	Governor	1/1/2001
Mr. Robert J. Savage, Sidney Qualifications (if required): public member	Governor	1/1/2001
Mr. Tom Welch, Dillon Qualifications (if required): public member	Governor	1/1/2001
Ms. Ronda Carpenter, Great Falls Qualifications (if required): public member	Governor	1/1/2001
Board of Investments (Commerce) Mr. Dick Anderson, Helena Qualifications (if required): public member	Governor	1/1/2001
Mr. Troy W. McGee, Helena Qualifications (if required): representative of the Public Employees' Retirement Board	Governor	1/1/2001
Mr. Bill Price, Lewistown Qualifications (if required): public member	Governor	1/1/2001
Mr. Tim Ryan, Great Falls Qualifications (if required): representative of the Teachers' Retirement Board	Governor	1/1/2001
Ms. Joy N. Ott, Billings Qualifications (if required): representative of the financial community	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Labor Appeals (Labor and Industry) Mr. Joseph E. Thares, Helena Qualifications (if required): public member	Governor	1/1/2001
Ms. Carol Vega, Butte Qualifications (if required): public member	Governor	1/1/2001
Board of Occupational Therapy Practice (Commerce) Ms. Linda Botten, Bozeman Qualifications (if required): occupational therapist	Governor	12/31/2000
Board of Oil and Gas Conservation (Natural Resources and Conservation) Mr. Allen C. Kolstad, Chester Qualifications (if required): public member	Governor	1/1/2001
Mr. Stanley Lund, Reserve Qualifications (if required): public member	Governor	1/1/2001
Mr. George Galuska, Billings Qualifications (if required): represents oil and gas industry	Governor	1/1/2001
Mr. David Ballard, Billings Qualifications (if required): represents oil and gas industry	Governor	1/1/2001
Board of Pardons (Corrections and Human Services) Mr. Gary Weer, Deer Lodge Qualifications (if required): public member	Governor	1/1/2001
Ms. Roxanna Wilson, Busby Qualifications (if required): auxiliary member and a Native American	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Personnel Appeals (Labor and Industry) Mr. Leo Perkins, Deer Lodge Qualifications (if required): representing labor unions	Governor	1/1/2001
Mr. Thomas Schneider, Helena Qualifications (if required): representing labor unions	Governor	1/1/2001
Mr. Bradley B. Talcott, Great Falls Qualifications (if required): representing management	Governor	1/1/2001
Board of Public Assistance (Public Health and Human Services) Ms. Gloria Paladichuk, Sidney Qualifications (if required): public member	Governor	1/1/2001
Mr. Dick Heineman, Wibaux Qualifications (if required): attorney	Governor	1/1/2001
Board of Public Education (Education) Ms. Joyce A. Silverthorne, Dixon Qualifications (if required): represents northwest quadrant of the state	Governor	2/1/2001
Board of Regents of Higher Education (Education) Ms. Deborah Wetsit, Billings Qualifications (if required): representative of District 4 and a Democrat	Governor	2/1/2001
Board of Respiratory Care Practitioners (Commerce) Ms. Iris L. Bungay, Cut Bank Qualifications (if required): certified respiratory therapist technician	Governor	1/1/2001
Ms. Linda Davis, Townsend Qualifications (if required): public member	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Social Work Examiners and Professional Counselors (Commerce) Ms. Mary Meis, Conrad Qualifications (if required): social worker	Governor	1/1/2001
Mr. Ervin Booth, Roundup Qualifications (if required): professional counselor	Governor	1/1/2001
Mr. Patrick Wolberd, Billings Qualifications (if required): social worker	Governor	1/1/2001
Mr. James Armstrong, Fort Harrison Qualifications (if required): social worker	Governor	1/1/2001
Children's Trust Fund Board (Public Health and Human Services) Mr. Chuck Hunter, Helena Qualifications (if required): Department of Public Health and Human Services representative	Governor	1/1/2001
Coal Board (Commerce) Mr. Alan Evans, Roundup Qualifications (if required): residing in an impact area and District 4	Governor	1/1/2001
Mr. Gerald Feda, Glasgow Qualifications (if required): public member residing in District 3	Governor	1/1/2001
Mr. Roger Knapp, Hysham Qualifications (if required): residing in an impact area and District 4	Governor	1/1/2001
Mr. James W. Royan, Missoula Qualifications (if required): public member residing in District 1	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Committee for the Humanities (Governor) Mr. Robert Poore, Butte Qualifications (if required): public member	Governor	1/2/2001
Ms. Jamie Doggett, White Sulphur Springs Qualifications (if required): public member	Governor	1/2/2001
Rep. Arla Jeanne Murray, Miles City Qualifications (if required): public member	Governor	1/2/2001
Dr. William Bevis, Missoula Qualifications (if required): public member	Governor	1/2/2001
Developmental Disabilities Planning and Advisory Council (Public Health and Human Services) Mr. Dan McCarthy, Helena Qualifications (if required): representing the Office of Public Instruction	Governor	1/1/2001
Mr. Jon Hesse, Livingston Qualifications (if required): attorney	Governor	1/1/2001
Ms. Marlene Disburg, Helena Qualifications (if required): representing vocational rehabilitation	Governor	1/1/2001
Ms. Vonnie Koenig, Kalispell Qualifications (if required): representing consumers	Governor	1/1/2001
Sen. Bea McCarthy, Anaconda Qualifications (if required): State Senator	Governor	1/1/2001
Mr. Robert J. Tallon, Bozeman Qualifications (if required): representing service provider organizations	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Developmental Disabilities Planning and Advisory Council (Public Health and Human Services) cont. Mr. Thomas Price, Eureka Qualifications (if required): representative of Region V	Governor	1/1/2001
Mrs Othelia Schulz, Anaconda Qualifications (if required): representative of Region IV	Governor	1/1/2001
Dr. Timm Vogelsberg, Missoula Qualifications (if required): representing a university program	Governor	1/1/2001
Mr. Charlie Rehbein, Helena Qualifications (if required): representative of program services of the Older Americans Act of 1995	Governor	1/1/2001
Rep. Bob Lawson, Whitefish Qualifications (if required): State Representative	Governor	1/1/2001
Mr. Bernadette Franks-Ongoy, Helena Qualifications (if required): representing the Montana Advocacy Program	Governor	1/1/2001
Ms. June Powell, Browning Qualifications (if required): Native American and has a family member with a developmental disability	Governor	1/1/2001
Electric Utility Industry Restructuring Advisory Committee (Legislative Services) Mr. Donald Quander, Billings Qualifications (if required): representing the industrial community	Governor	1/1/2001
Ms. Roma Taylor, Bigfork Qualifications (if required): representing the nonindustrial retail electric consumer sector	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Electric Utility Industry Restructuring Advisory Committee (Legislative Services) cont. Mr. Gene Leuwer, Helena Qualifications (if required): representing a low-income program provider	Governor	1/1/2001
Mr. Stephen E. Bradley, Crow Agency Qualifications (if required): representing Montana's Indian tribes	Governor	1/1/2001
Mr. Stan Dupree, Butte Qualifications (if required): representing organized labor	Governor	1/1/2001
Ms. Kathy Hadley, Butte Qualifications (if required): representing the community comprising environmental and conservation interests	Governor	1/1/2001
Mr. Neil Colwell, Boise Qualifications (if required): representing the electric power market industry	Governor	1/1/2001
Fish, Wildlife and Parks Commission (Fish, Wildlife and Parks) Mr. David Simpson, Hardin Qualifications (if required): resident of District V	Governor	1/1/2001
Mr. Charles R. Decker, Libby Qualifications (if required): resident of District I	Governor	1/1/2001
Mr. Stanley F Meyer, Great Falls Qualifications (if required): resident of District III	Governor	1/1/2001
Hail Insurance Board (Agriculture) Auditor Mark O'Keefe, Helena Qualifications (if required): State Auditor	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Hail Insurance Board (Agriculture) cont. Mr. W. Ralph Peck, Helena Qualifications (if required): Director of the Department of Agriculture	Governor	1/1/2001
Hard Rock Mining Impact Board (Commerce) Mr. Roger W. Kornder, Lincoln Qualifications (if required): represents major financial institution and resides in an impact area	Governor	1/1/2001
Ms. Carol Kienenberger, Dodson Qualifications (if required): County Commissioner residing in an impact area	Governor	1/1/2001
Ms. Tammy Johnson, Whitehall Qualifications (if required): hard rock mining industry representative	Governor	1/1/2001
Human Rights Commission (Labor) Ms. S. Jane Lopp, Kalispell Qualifications (if required): public member	Governor	1/1/2001
Ms. Gloria "Patt" Etchart, Glasgow Qualifications (if required): public member	Governor	1/1/2001
Ms. Evelyn Stevenson, Pablo Qualifications (if required): attorney	Governor	1/1/2001
Independent Living Advisory Council (Public Health and Human Services) Ms. Shelly Laing, Kalispell Qualifications (if required): none specified	Director	1/1/2001
Ms. Flo Kiewel, Columbia Falls Qualifications (if required): none specified	Director	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Independent Living Advisory Council (Public Health and Human Services) cont. Ms. Wilfred "Max" Bear, Poplar Qualifications (if required): none specified	Director	1/1/2001
Joint Subcommittee on Postsecondary Education Policy and Budget (Legislature) Mr. Erik Burke, Helena Qualifications (if required): representative of the Governor's Office	Governor	12/31/2000
Mr. Brad Faulhaber, Dillon Qualifications (if required): student representative	Governor	12/31/2000
Judicial Nomination Commission (Justice) Mr. David Bliss, Conrad Qualifications (if required): public member	Governor	1/1/2001
Mr. L. Randall Bishop, Billings Qualifications (if required): none specified	Supreme Court	12/31/2000
Milk Control Board (Livestock) Ms. Dixie S. Hertel, Moore Qualifications (if required): Republican	Governor	1/1/2001
Mr. Milton "Swede" Olson, Whitewater Qualifications (if required): Republican	Governor	1/1/2001
Mr. Jesse Russell Gleason, Fairfield Qualifications (if required): Republican	Governor	1/1/2001
Missouri River Basin Advisory Council (Natural Resources and Conservation) Ms. Diane Brandt, Glasgow Qualifications (if required): public member	Governor	2/24/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Missouri River Basin Advisory Council (Natural Resources and Conservation) cont. Mr. Don Pfau, Lewistown Qualifications (if required): public member	Governor	2/24/2001
Mr. Bud Clinch, Helena Qualifications (if required): Director of the Department of Natural Resources and Conservation	Governor	2/24/2001
Mr. Jim Rector, Glasgow Qualifications (if required): public member	Governor	2/24/2001
Mr. Ron Miller, Glasgow Qualifications (if required): public member	Governor	2/24/2001
Mr. Steve Page, Glasgow Qualifications (if required): public member	Governor	2/24/2001
Mr. Tom Huntley, Sidney Qualifications (if required): public member	Governor	2/24/2001
Mr. John Foster, Lewistown Qualifications (if required): public member	Governor	2/24/2001
Mr. Boone A. Whitmer, Wolf Point Qualifications (if required): public member	Governor	2/24/2001
Mr. Buzz Mattelin, Brockton Qualifications (if required): public member	Governor	2/24/2001
Montana Children's Trust Fund Board (Public Health and Human Services) Ms. Judy Birch, Helena Qualifications (if required): public member	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Montana Children's Trust Fund Board (Public Health and Human Services) cont. Ms. Barbara Campbell, Deer Lodge Qualifications (if required): public member	Governor	1/1/2001
Mr. Kirk Astroth, Belgrade Qualifications (if required): public member	Governor	1/1/2001
Mr. Mark A. Bryan, Bozeman Qualifications (if required): public member	Governor	1/1/2001
Montana Grass Conservation Commission (Natural Resources and Conservation) Mr. Dewayne Ozard, Glasgow Qualifications (if required): grazing district preference holder	Governor	1/1/2001
Montana Health Facility Authority Board (Commerce) Dr. Amos R. Little, Jr., Helena Qualifications (if required): public member	Governor	1/1/2001
Ms. Gayle Carpenter, Helena Qualifications (if required): public member	Governor	1/1/2001
Ms. Joyce Asay, Forsyth Qualifications (if required): public member	Governor	1/1/2001
Mr. Michael P. Varone, Helena Qualifications (if required): public member	Governor	1/1/2001
Montana Higher Education Student Assistance Corporation (Education) Mr. Richard Bartos, Helena Qualifications (if required): public member	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Montana State Lottery Commission (Commerce) Ms. Becky Erickson, Glasgow Qualifications (if required): public member	Governor	1/1/2001
Sheriff Clifford Brophy, Columbus Qualifications (if required): law enforcement officer	Governor	1/1/2001
Montana Vocational Rehabilitation Council (Public Health and Human Services) Ms. Martha Lehman, Helena Qualifications (if required): none specified	Director	12/15/2000
Motor Fuel Tax Collection, Enforcement and Refund Advisory Council (Transportation) Mr. Joel T. Long, Billings Qualifications (if required): representative of the Montana Contractors Association	Governor	12/31/2000
Rep. Gary Beck, Deer Lodge Qualifications (if required): legislator	Governor	12/31/2000
Ms. Rona Alexander, Bozeman Qualifications (if required): representative of the Montana Petroleum Marketers Association	Governor	12/31/2000
Sen. Ric Holden, Glendive Qualifications (if required): legislator	Governor	12/31/2000
Rep. Roger Somerville, Kalispell Qualifications (if required): legislator	Governor	12/31/2000
Sen. Debbie Shea, Butte Qualifications (if required): legislator	Governor	12/31/2000
Mr. Bob Stephens, Dutton Qualifications (if required): representative of the Montana Grain Growers	Governor	12/31/2000

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Motor Fuel Tax Collection, Enforcement and Refund Advisory Council (Transportation) cont.		
Mr. Patrick McNulty, Buffalo Qualifications (if required): representative of the Montana Agricultural Producers	Governor	12/31/2000
Mr. Keith Olson, Kalispell Qualifications (if required): representative of the Montana Logging Association	Governor	12/31/2000
Ms. Gail Abercrombie, Helena Qualifications (if required): representative of the Montana Petroleum Association	Governor	12/31/2000
Mr. Robert Turner, Helena Qualifications (if required): representative of the Montana Department of Transportation	Governor	12/31/2000
Mr. Wes Choc, Helena Qualifications (if required): representative of AAA of Montana	Governor	12/31/2000
Mr. Jim Peterson, Buffalo Qualifications (if required): representative of the Montana Stockgrowers Association	Governor	12/31/2000
Mr. Mike Gauthier, Missoula Qualifications (if required): representative of the Montana Motor Carriers Association	Governor	12/31/2000
Northwest Power Planning Council (Governor)		
Mr. Stan Grace, Helena Qualifications (if required): none specified	Governor	1/1/2001
Mr. John N. Etchart, Fort Worth, TX Qualifications (if required): none specified	Governor	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
State Employee Group Benefits Advisory Council (Administration) Mr. William Salisbury, Helena Qualifications (if required): none specified	Director	1/1/2001
Mr. Thomas Schneider, Helena Qualifications (if required): none specified	Director	1/1/2001
Mr. Dale Taliaferro, Helena Qualifications (if required): none specified	Director	1/1/2001
Ms. Nancy Ellery, Helena Qualifications (if required): none specified	Director	1/1/2001
Mr. Curt Nichols, Helena Qualifications (if required): none specified	Director	1/1/2001
Mr. Jim Penner, Helena Qualifications (if required): none specified	Director	1/1/2001
Mr. Mark Cress, Helena Qualifications (if required): none specified	Director	1/1/2001
Ms. Cathy Kendall, Helena Qualifications (if required): none specified	Director	1/1/2001
Mr. John W. Northey, Helena Qualifications (if required): none specified	Director	1/1/2001
Ms. Angela McDannel, Helena Qualifications (if required): none specified	Director	1/1/2001

VACANCIES ON BOARDS AND COUNCILS -- December 1, 2000 through February 28, 2001

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
State Tax Appeal Board (Administration) Rep. Jan Brown, Helena Qualifications (if required): public member	Governor	1/1/2001
Transportation Commission (Transportation) Ms. Patricia Abelin, Bozeman Qualifications (if required): Republican from District 2	Governor	1/1/2001
Mr. Thorm R. Forseth, Billings Qualifications (if required): Independent from District 5	Governor	1/1/2001
Mr. Robert C. McKenna, Helena Qualifications (if required): Democrat from District 3	Governor	1/1/2001
Vocational Rehabilitation Advisory Council (Public Health and Human Services) Ms. Kris Kleinschmidt, Great Falls Qualifications (if required): none specified	Director	2/5/2001